No. 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

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The Federal Communications Commission respectfully asks this Court to issue a writ of certiorari to review the April 14, 1978, order of the Court of Appeals for the District of Columbia (*Execunet II*) which granted a motion for an order directing compliance with that court's previous mandate in *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (*Execunet I*).

OPINIONS BELOW

The order and opinion of the court of appeals (Pet. App. A) and the decision of the FCC (Pet. App. C) are not yet reported.

JURISDICTION

The court of appeals issued its order on April 14, 1978. That court denied timely filed petitions for rehearing and suggestions of rehearing *en banc* by orders dated May 8, 1978 (Pet. App. D). This petition is filed within the time allowed by statute, as enlarged by this Court's order to August 17, 1978. 28 U.S.C. § 2350(a). This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Common carriers have no duty under the Communications Act to connect their facilities with those of other carriers unless and until the FCC, "after opportunity for hearing," finds that connection is "necessary or desirable in the public interest. . . ." 47 U.S.C. § 201(a). In response to a request by the American Telephone and Telegraph Company (AT&T) for clarification of its interconnection obligations, the FCC issued a declaratory ruling that its own orders pursuant to Section 201(a) had not required the established telephone carriers to provide interconnections for use by the specialized carriers in offering ordinary long distance service. (Pet. App. C.) The court of appeals, purporting to enforce its mandate in *Execunet I* (Pet. App. B), which dealt with the scope of specialized carriers' facilities authorizations under Section 214, 47 U.S.C. § 214, required immediate interconnection between the carriers without limitation as to services (Pet. App. A).

The *Execunet II* decision presents these anomalies. First, in ordering interconnection, the court of appeals relied primarily on its earlier interpretation (in *Execunet I*) of a provision (Section 214) which does not have anything to do with interconnection, rather than on an independent evaluation of Section 201(a), which does govern interconnection. Second, although Section 201(a) plainly contemplates that the FCC *knowingly* hold a "hearing" and thereafter make an affirmative "public interest" finding before mandating interconnection, the *Execunet II* court disbelieved or ignored the FCC's protestations that it had never held such a hearing, never made the requisite finding, and never mandated interconnection. Third, on the strength of *Execunet I*, which barely mentioned and certainly never focused upon the subject of interconnection, the *Execunet II* decision overrode another decision (the Third Circuit's) which had directly considered and defined the scope of the FCC's only relevant interconnection orders, in reliance upon and consistent with the FCC's views. Fourth, even though AT&T had been specifically denied an FCC hearing on MTS/WATS interconnection because that issue was beyond the scope of the inquiry, *Execunet II* told AT&T years later that the issue *had* been decided after all and that the carrier reasonably should have known that all along.

The questions for this Court are:

1. Did the court of appeals impermissibly expand its mandate to govern matters which were neither

considered nor decided in its earlier decision but which had been resolved definitively in another circuit in a manner that conflicts directly with the order in *Execunet II*?

2. Did the court of appeals act beyond its authority as a court reviewing agency action when it ordered immediate carrier interconnection?

3. Did the court of appeals erroneously apply the relevant statute in finding that the FCC had required carriers to connect their facilities even though (a) the agency concededly had not provided an opportunity for hearing and had not made the requisite public interest finding and (b) another court of appeals, on direct review of the FCC's interconnection order, had held that those orders did not require this kind of connection?

STATUTES INVOLVED

Sections 201(a) and 214(a) and (c) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 201(a), 214(a) and (c), state, in pertinent part:

> *Section 201(a).* It shall be the duty of every common carrier engaged in interstate and foreign communication by wire or radio * * *, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers * * *.

Section 214(a). No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.

Section 214(c). The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof * * *, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require * * *.

STATEMENT

The court of appeals continues in this case to make and implement important communications policy. In *Execunet I*, the court held that the FCC had inadvertently granted unlimited authorizations to the "specialized" common carriers, with the result that those carriers are free to offer any services they may choose over their own intercity facilities. That decision drastically expanded the FCC's competition policy to include services the FCC had not intended to embrace in its policy. (Pet. App. B.)

In this case, the court of appeals implemented its earlier expansion of the FCC's competition policy by directing the established telephone companies to interconnect their local exchange facilities with the specialized carriers' interstate facilities. (Pet. App. B.) The court of appeals' latest order rested not on error in the FCC's own interconnection decisions, but upon the court's own perception of what is necessary to realize "the intended effect of [its] decree" in *Execunet I*.

The court of appeals in *Execunet II* granted a motion for an order requiring immediate interconnection between local exchange telephone facilities and the intercity facilities of specialized communications common carriers, to enable those carriers to provide ordinary long distance service. (Pet. App. 4A-5A.) Although that court purported merely to direct compliance with its earlier mandate in *Execunet I*,[1] its order in effect (1) performed an important substantive administrative function (requiring carriers to connect their facilities) that Congress has expressly delegated to the FCC; (2) expanded the *Execunet I* mandate to govern matters that the court did not consider or decide in that case; (3) summarily reversed a decision of the FCC that rested entirely upon the agency's construction of its own prior orders, as another court of appeals had construed those

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[1] *MCI Telecommunications Corp.* v. *FCC*, *supra*, 561 F.2d 365 (Pet. App. B).

orders on direct review;[2] and (4) left the FCC with the dilemma of irreconcilable judicial mandates with respect to the scope of its outstanding interconnection orders.

Execunet II apparently rests upon the court of appeals' assumption that its earlier mandate had resolved all questions regarding long distance telephone competition in favor of the successful litigants in *Execunet I*. (Pet. App. 18A, 5E, 10D.) Thus, the court required interconnection because, as a practical matter, the specialized carriers needed local exchange facilities to provide long distance service—even though the court had not considered the "very different issue" of interconnection in *Execunet I* (Pet. App. 27B n. 59) and even though the holding in that case had been limited expressly to a finding of procedural error in the FCC's certification process (Pet. App. 30B-31B, 32B). In this statement, we describe briefly the *Execunet I* case, the relevant interconnection orders as construed on direct review in another circuit, the FCC's declaratory ruling in this case, and the *Execunet II* decision.

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[2] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1023, *reh. denied*, 423 U.S. 886 (1975).

A. Execunet I.[3]

Interstate common carriers provide services that may be divided into two broad categories: public telecommunications services, including ordinary long distance message toll telephone service (MTS) and wide area telephone service (WATS); and private line services, also known as leased line services.[4] While MTS and WATS historically have been monopoly offerings, private line services have been competitive to some degree.[5] The Commission in recent years has encouraged and authorized new entry into specialized private line services.[6] It has not consciously introduced competition into MTS and WATS.

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[3] We describe the *Execunet I* case in some detail because an understanding of that case is essential to informed action on our petition for certiorari. Although the FCC continues to believe that *Execunet I* was incorrectly decided, this Court denied our petition for certiorari in that case. 434 U.S. 1040. Our present petition assumes that *Execunet I* is now binding on the Commission.

[4] President's Task Force on Communications Policy, *Final Report*, Ch. 6, pp. 9-10 (1968); M. Irwin, *The Telecommunications Industry*, pp. 24-25 (1971).

[5] See *Nader* v. *FCC*, 520 F.2d 182, 197 (D.C. Cir. 1975); *American Tel. & Tel. Co.* v. *FCC*, 487 F.2d 865, 868 (2d Cir. 1973).

[6] *E.g.*, *Specialized Common Carrier Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). See generally, *Customer Interconnection*, 61 FCC 2d 766 (1976) (an appraisal of the economic impact of the FCC's competition policies on the telecommunications industry, including an overview of those policies).

MCI Telecommunications Corp., the petitioner in the court of appeals, is a "specialized common carrier" operating under FCC authorizations. MCI filed a tariff in 1974 to broaden its service offerings by providing a "metered use service" as an additional option to its full-time and part-time private line services.[7] Although the tariff did not mention Execunet by name or describe the service, MCI began to offer Execunet pursuant to the tariff early in 1975.

Several months later, AT&T complained to the FCC that Execunet was outside the scope of MCI's authorizations. AT&T alleged that Execunet was not a private line service at all, but was functionally the same as MTS or WATS.[8] (Pet. App. 4B.) The

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[7] A private line service is what the name implies: a service in which the customer buys the privilege of using facilities that are dedicated in some meaningful respect to his or her personal use, always available to the customer, directly connecting the customer's premises with another point (or a number of other points) selected in advance, capable of instant connection without the need for dialing, and tariffed at a periodic rate rather than according to use. See *MCI Telecommunications Corp. (Execunet)*, 60 FCC 2d 25, 40-44 (1976). A private line service need not have all these characteristics. *Private Line Cases*, 34 FCC 244, 249-51 (1961), 34 FCC 217 (1963), *aff'd sub nom. Wilson & Co.* v. *FCC*, 335 F.2d 788, 792 (7th Cir. 1964), *remanded for consent settlement*, 382 U.S. 454 (1966).

[8] An Execunet customer may place calls from any telephone in the Execunet network to any telephone in a distant city in the network by dialing a local MCI number, a customer access code, and the telephone number in the distant city. The customer pays a toll for each call that is based on time and distance, subject to a minimum monthly charge. (Pet. App. 5A n.2, 3B & n.3.)

Commission had consistently asserted that it had authorized competition by specialized carriers such as MCI only in private line services, and that those carriers had no authority to provide MTS or WATS.[9]

After obtaining comments from interested parties and hearing oral argument, the FCC concluded that Execunet was not a private line service, but that it had all the essential characteristics of MTS or WATS. Concluding that MCI had no authority to offer such a service under its existing certificates, the Commission directed MCI to cease and desist from offering Execunet.[10]

On judicial review, the court of appeals reversed, in *Execunet I.* (Pet. App. B.) After outlining its view of the statutory scheme for regulating common

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[9] See *American Tel. & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *Washington Util. & Transp. Comm., supra*, 513 F.2d 1142; *Bell Tel. Co. of Penn., supra*, 503 F.2d 1250. *Cf. Microwave Communications, Inc.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Penn. 1973), *vacated* (on primary jurisdiction grounds), 496 F.2d 214 (3d Cir. 1974). The FCC had confined its specialized carrier proceeding to private line services as a matter of administrative efficiency, both because the applicants had proposed only that kind of service and because the public policy questions involved in MTS/WATS competition would be much more complex and apparently did not need to be resolved in that proceeding.

[10] *MCI Telecommunications Corp.*, 60 FCC 2d 25. The question for the FCC in that proceeding was whether MCI's existing certificates were broad enough to permit the offering of Execunet—not whether the FCC should open further markets (including the MTS and WATS markets) to competition. *Id.* at 35.

carriers under Title II of the Communications Act, that court stated:

> Applying these principles to the instant case, the issues to be resolved are two: whether and to what extent Section 214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly exercised whatever authority it may have under Section 214.

(Pet. App. 21B.) The court of appeals decided, on the basis of statutory analysis, that the FCC did have authority to restrict the services a carrier may offer; but it found that the FCC may do so only if it has "affirmatively determined" that the public convenience and necessity require such restrictions. (Pet. App. 24B-26B.)

Turning to the second question—whether the FCC had properly exercised its authority to restrict MCI's authorizations to particular services—the court of appeals analyzed the *Specialized Common Carrier Services* rulemaking proceeding, and concluded that the Commission had not made the requisite statutory findings to restrict specialized carriers to private line services. (Pet. App. 26B-31B.) Accordingly, it held that MCI's facility authorizations were not restricted and that the Commission had erred in requiring MCI to cease and desist from offering Execunet on grounds that it was an unauthorized service. *Id.*

That court made no findings beyond its holding that the FCC had not properly restricted MCI's authorizations and therefore could not require MCI to terminate a particular service on grounds that it was unauthorized. In fact, the court of appeals expressly denied any broader holding:

> We have today decided that the Commission erred in rejecting MCI's Execunet tariff as unauthorized. The Commission has no general authority to insist that carriers receive its approval before filing tariffs proposing new services or rates. Only if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized. In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings.

(Pet. App. 32B.) There was no mention of interconnection rights or obligations, because none of the parties had raised these questions either before the Commission or in the court of appeals.[11]

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[11] The court of appeals also did not disturb the FCC's finding that Execunet was the functional equivalent of MTS or WATS, although MCI had challenged that finding on review. (Pet. App. 36C.)

When the FCC and others petitioned this Court for certiorari,[12] MCI and another specialized carrier, Southern Pacific Communications Co., argued that the Court should deny the petitions because, *inter alia*, (1) the court of appeals had merely remanded the matter to the FCC for its further consideration, (2) the *Execunet* decision was narrowly limited to a finding of procedural inadequacy in the certification process and did not require the FCC to take any particular action with regard to its competition policies, and (3) in this posture, the case was not ripe for review by this Court.[13] The Court denied the petitions for certiorari,[14] although, of course, we have no way of knowing whether these arguments by MCI and Southern Pacific influenced its decision.

Shortly after denial of certiorari, the FCC undertook to set its competition policies in order, in light of both its statutory mandate and the *Execunet I* mandate. First, it initiated an inquiry into the MTS and WATS market structure, with a view to determining whether competition in those areas would serve the public interest.[15] Second, the Commission

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[12] The United States Independent Telephone Ass'n (USITA) and AT&T filed petitions in addition to the FCC's petition. Nos. 77-420, 77-421 and 77-436.

[13] MCI's Brief for the Respondents in Opposition, pp. 35-40; Brief for the Respondent Southern Pacific Communications Co. in Opposition, pp. 10-14.

[14] 434 U.S. 1040 (Justices Stewart and Powell stating that they would have granted the writ).

[15] *In the Matter of MTS and WATS Market Structure,* FCC 78-144, released February 28, 1978. The *Execunet I* opinion

acted on a petition by AT&T for clarification of that company's interconnection obligations to MCI and other specialized carriers. The FCC's declaratory ruling in response to AT&T's petition, interpreting the agency's own previous orders as not requiring interconnection for MTS and WATS services, was the genesis of *Execunet II*. (Pet. App. C.)

B. The Declaratory Ruling.

AT&T's petition asked the FCC to issue a declaratory ruling with regard to its outstanding interconnection orders so as to make clear that the telephone company had no obligation to provide additional interconnections to MCI for Execunet and other non-private line services.[16] The Commission considered the petition in light of comments and arguments of interested parties and in full awareness

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had stated that the court of appeals had not considered "whether competition like that posed by Execunet is in the public interest," and had said that was "the question for the Commission to decide should it elect to continue these proceedings." (Pet. App. 32B.) In fact, the Commission had no "election" in the matter. It had a statutory responsibility to resolve this important policy question, as well as a duty to act on specific applications and requests for rulings, such as AT&T's request for clarification of its interconnection obligations. (Pet. App. 43C.)

[16] AT&T asked the FCC broadly to declare that there was no interconnection obligation under the antitrust laws, the common law, or any other federal or state statute in addition to the Communications Act. The Commission expressly denied the petition insofar as it requested a determination of AT&T's obligations arising apart from the Communications Act. (Pet. App. 52C, 11A n.14.)

of the *Execunet I* mandate. But its decision necessarily rested upon an interpretation of its own previous interconnection orders, as those orders had been construed on direct review.

1. *Relevant interconnection orders.* Although common carriers have no duty under the Communications Act to connect their facilities with those of other carriers,[17] the Commission may require interconnection, after opportunity for hearing, on the basis of a public interest finding. 47 U.S.C. § 201(a). Rights and obligations to interconnection do not arise from certification of facilities; rather, interconnection and certification are discrete regulatory functions governed by independent statutes and different policy objectives and concerns.[18]

In its *Specialized Common Carrier Services* proceeding, the Commission established an open entry policy under Section 214(a) for new carriers who had proposed to offer specialized communications services. At the same time, the Commission addressed the Section 201(a) problem of providing local distri-

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[17] *Bell Tel. Co. of Penn., supra,* 503 F.2d at 1270. See *Atchison, T. & S.F. R.R.* v. *Denver & N.O. R.R.,* 110 U.S. 667, 680 (1884); *Western Union Telegraph Co.,* 17 FCC 152, 171 (1952), 17 FCC 503 (1953).

[18] The Commission may grant a certificate of convenience and necessity authorizing new facilities, pursuant to Section 214(a), without requiring interconnection, pursuant to Section 201(a). See *Western Union Telegraph Co., supra,* 17 FCC 503 (FCC denied request of Western Union for connection with AT&T for purposes of providing video transmission service over facilities the Commission had authorized).

bution facilities for the new carriers, and declared that "established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers . . . ." *Specialized Common Carrier Services*, 29 FCC 2d at 940. The interconnection question, like the question of Section 214 authorizations, was considered on the assumption that the only authorizations and interconnection rights at stake were those essential to the provision of specialized services.

Two years later, MCI complained to the Commission that AT&T had refused to interconnect with MCI for the provision of two services ("FX" and "CCSA")[19] which AT&T offered to the public as private line services. After a show cause proceeding in which all interested parties filed comments and argued before the Commission *en banc*, the Commission concluded that its *Specialized Common Carrier Services* decision had required interconnection for all private line services, including FX and CCSA.[20] The

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[19] For a description of these two private line services, see *Bell System Tariff Offerings*, 46 FCC 2d 413, 418 n.5 (1974), quoted at *Bell Tel. Co. of Penn., supra*, 503 F.2d at 1254 n.4.

[20] In oral argument before the FCC, Mr. Laurence E. Harris, MCI's vice president, stated that one reason for assuming that the Commission had ordered FX and CCSA interconnection was that "the staff specifically singled out and excluded from consideration MTS and WATS services. Had it contemplated that FX and CCSA or any other services were not included [in the interconnection obligation], it would clearly have made specific reference to them at this point." FCC

Commission ordered AT&T to provide the interconnection MCI had asked for those two services. *Bell System Tariff Offerings*, 46 FCC 2d 413.

On judicial review, the Third Circuit affirmed. *Bell Tel. Co. of Penn., supra*, 503 F.2d 1250. In the process, that court had to resolve an argument that the interconnection requirement was overbroad. The Third Circuit agreed that the requirement, if it were read in a vacuum, "is somewhat vague and, to a certain extent, overbroad." But it found no necessity to remand on this ground, because it read the interconnection requirement in the context of the *Specialized Common Carrier Services* proceeding. Given this context, the court found that the FCC's order took on a definite meaning:

> As we read the order, the FCC has required AT&T to provide to the specialized carriers those (interconnection) elements of private line services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department.

503 F.2d at 1273-74. It affirmed the interconnection order, thus construed.[21]

Docket No. 19896, Tr. pp. 77, 78 (March 4, 1974). See also *MCI Communications Corp.* v. *AT&T*, *supra* n.9, 369 F. Supp. at 1027 ("The Commission did mention wide area telephone service (WATS) and long-distance toll service, but only to exclude them from the scope of the decision. If FX, CCSA, and interexchange were to have been excluded also, they would have been singled out as were WATS and private long-distance toll calls.")

[21] The Third Circuit also found that AT&T had not been deprived of its hearing rights under Section 201(a) because

The Commission has issued no other interconnection orders either constricting or expanding the rights of the specialized carriers and the obligations of the established carriers.

2. *The Clarification Order.* At an open meeting on February 23, 1978, in which interconnection, service competition and the *Execunet I* decision were discussed at length, the FCC adopted its declaratory ruling.[22] The ruling rested on the Commission's construction of its own interconnection orders, as affirmed and construed by the Third Circuit, in the light of *Execunet I.* (Pet. App. C.) The Commission concluded that it had provided no opportunity for hearing on MTS and WATS interconnection and had not made the statutory public interest finding that was required for a Section 201(a) order to interconnect. Thus, the Commission declared that AT&T had no obligation under outstanding FCC orders to provide additional interconnection for Execunet or other services that are substantially equivalent to MTS or WATS. *Id.*

The FCC stated that its interconnection ruling was "entirely consistent" with *Execunet I.* (Pet. App.

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it had "notice of the Commission's intentions" as to interconnection and could claim "neither surprise nor denial of the opportunity to speak meaningfully to the issues before the Commission." 503 F.2d at 1268.

[22] In its brief in *Bell Tel. Co. of Penn., supra,* the FCC had told the Third Circuit that if any serious questions arose as to the extent of AT&T's interconnection obligations to the specialized carriers, "AT&T can seek guidance from the Commission." (Pet. App. 43C.)

41C.) The error the court had found in that case was the FCC's failure to make an affirmative public interest finding which the court regarded as a prerequisite to imposing service restrictions on certificates. The court had reasoned that "failure to consider" the matter was not the same thing as making "an affirmative determination" that the public interest required restrictions, the Commission stated. (Pet. App. 41C, referring to the court's reasoning at Pet. App. 27B-28B.)

The FCC said that Section 201(a) also required an affirmative finding as a prerequisite to an interconnection order. Since the Commission had expressly excluded MTS and WATS from consideration in the *Specialized Common Carrier Services* proceeding, it had made no affirmative determination that interconnection for such services would serve the public interest. (Pet. App. 41C-42C.) Thus, the Commission concluded, its prior orders as construed in *Execunet I* could not have required such interconnection. *Id.*

MCI immediately petitioned the D.C. Circuit for review of the declaratory order.[23] At the same time, it filed a motion with the court, in the *Execunet I* docket, asking for an order directing the FCC to comply with the court's mandate by requiring AT&T to furnish additional interconnection facilities for Execunet.

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[23] *MCI Telecommunications Corp.* v. *FCC*, No. 78-1150, D.C. Circuit. This case remains on the docket in the D.C. Circuit.

C. Execunet II.

The Commission had no opportunity to defend its declaratory ruling on the merits, as it would on direct review. Instead, the Commission addressed itself to the motion to direct compliance with mandate.[24] It argued that *Execunet I* did not and could not require interconnection because neither the parties nor the court had addressed that matter in the earlier case. In any event, the Commission argued, the Third Circuit had resolved the interconnection question on direct review in precisely the same way as the declaratory ruling, and the mandate of the Third Circuit controls the question—not the mandate of the D.C. Circuit in *Execunet I*. The Commission urged the court of appeals to deny the motion and to consider interconnection in the separate review proceeding that MCI had initiated, in which the FCC would have a full opportunity for briefing and oral argument.

The court of appeals issued its *Execunet II* order on April 14, 1978. Conceding that *Execunet I* was "not addressed explicitly to the interconnection issue or to AT&T's obligation to provide interconnection" (Pet. App. 13A), the court concluded that the "thrust" of its opinion and "the expansive interpretation of *Specialized Carrier*" it had advanced "clearly mandate[d] an equally expansive view of the scope of the interconnection obligations" (Pet. App. 16A,

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[24] The FCC released its order on February 28. FCC litigation counsel responded to the motion to direct compliance on April 6. There was no opportunity for oral argument.

17A). Denial of further Execunet interconnections, that court said, "deliberately frustrates the purpose of the litigation" (Pet. App. 18A), and gives MCI "good cause to feel that [the FCC order] is strikingly unfair" (Pet. App. 12A).

The court of appeals rejected the argument that the Third Circuit's decision controlled the interconnection matter:

> [J]ust as the Third Circuit found *Specialized Carrier* sufficiently broad to include FX and CCSA service, notwithstanding the absence of specific references to those services, so too we have found that decision broad enough to encompass Execunet, notwithstanding the similar absence of specific references.

(Pet. App. 21A.) The D.C. Circuit did not address the Commission's observation in the ruling that Section 201(a) requires an affirmative public interest finding as a prerequisite to an order for MTS and WATS interconnection and that the FCC had made no such finding.

The court of appeals denied rehearing and rehearing *en banc* on May 8, 1978, with Judges Leventhal and McGowan not participating. (Pet. App. D.)[25]

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because (1) the order in *Execunet II* conflicts directly with a decision

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[25] This Court, on May 22, denied the applications of AT&T and USITA for stay pending certiorari.

of the Third Circuit and thus confronts the Commission with irreconcilable judicial interpretations of its interconnection orders; (2) the court of appeals has expanded its *Execunet I* mandate to govern matters the court did not consider or decide in the earlier case; (3) the court of appeals has performed an administrative function in establishing important communications policy and ordering interconnection to implement its policy, in derogation of the Commission's statutory function and in violation of the proper role of courts reviewing agency action; and (4) the court's decision is wrong as a matter of statutory interpretation and construction of the relevant agency decisions.

1. Conflict with the Third Circuit.

The Third Circuit's decision in *Bell Tel. Co. of Penn., supra*, 503 F.2d 1250, affirmed the FCC's only relevant interconnection orders and construed them as requiring AT&T to interconnect with the specialized carriers only for the full range of private line services. The Third Circuit directly addressed the scope of interconnection under those orders, because that was what its case was about. It found, after analysis of the FCC's *Specialized Common Carrier Services* policy decision and the interconnection enforcement order in *Bell System Tariff Offerings*,[26] that the FCC had required only "those (interconnection) elements of private line service which AT&T

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[26] 46 FCC 2d 413 (1974). The Third Circuit reviewed the interconnection enforcement order in *Bell Tel. Co. of Penn.*

supplies to its affiliates. . . ." 503 F.2d at 1273-74. The court also found that AT&T had the required "opportunity for hearing" because it was given "notice of the Commission's intentions" and thus could claim "neither surprise nor denial of the opportunity to speak meaningfully to the issues before the Commission. . . ." *Id.* at 1268.

To resolve AT&T's inadequate notice and overbreadth arguments, the Third Circuit had to determine whether and where the Commission had drawn a line between services for which interconnection had been ordered and services for which interconnection had not been ordered. By contrast, the D.C. Circuit held that the Commission had not drawn such a line and, indeed, that further proceedings were necessary before the Commission could lawfully forbid interconnection for any category of services. A close analysis of the process of reasoning by which the Third Circuit reached its holdings on notice and breadth reveals the irreconcilable conflict with the rationale and decision in *Execunet II*.

In determining that AT&T had adequate notice in the *Specialized Common Carrier Services* proceeding, the Third Circuit relied heavily on the notice's distinction between "message toll telephone and wide area telephone service" on the one hand and "private line program transmission and other more specialized services" on the other hand. 503 F.2d at 1269. Quoting the rulemaking notice, the court concluded that the Commission had contemplated that, at most, only "2-4 percent" of AT&T's total business would be

"vulnerable to competition" if interconnection were ordered. *Id.* In reasoning that the Commission's reference to "percentages" and its "analysis" of competitive vulnerability gave adequate notice that FX and CCSA were candidates for forced interconnection, the Third Circuit explicitly decided, first, that the "2-4 percent" excluded MTS/WATS and, second, that FX and CCSA were "perforce include[d]" on the basis of "[s]imple mathematics." *Id.* Thus, the *ex*clusion of MTS/WATS was a logical prerequisite to the court's *in*clusion of FX and CCSA, and was not mere dictum or a negative inference unnecessary to the result.[27]

The exclusion of MTS/WATS was also an essential ingredient of the Third Circuit's affirmance of the breadth of the interconnection order. AT&T had charged that the order was "unbounded." Agreeing that the order on its face provided insufficient guidance, the court limited the order to "private line" services in accordance with what it viewed as the intended "context" of the Commission's decision. 503 F.2d at 1273. The court indicated that, absent this limitation, remand would have been necessary.[28] *Id.*

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[27] See also *MCI Communications, Inc.* v. *AT&T, supra,* 369 F. Supp. at 1015, 1027.

[28] If thereafter the Commission had ruled that its previous order did compel interconnection with MCI for Execunet and other MTS- and WATS-like services, AT&T could have gone promptly to the Third Circuit and obtained summary reversal. AT&T's argument would have been bolstered by the fact that in obtaining the Third Circuit's initial ruling, the Commission, MCI, and others had represented that the interconnection

The D.C. Circuit ruling stands in stark contrast to the foregoing. Whereas the Third Circuit effectively decided that the adequacy of notice and the breadth of the interconnection obligation hinged on the exclusion of MTS/WATS, the D.C. Circuit held that interconnection for MTS/WATS-type services was obligatory. The D.C. Circuit stated that its expansive interpretation of MCI's authorizations "mandates an equally expansive view of the interconnection obligation. . . ." (Pet. App. 17A.) Since that court had earlier held that MCI's authorizations were not restricted in any way (Pet. App. 31B), it follows from the *Execunet II* order that the interconnection obligation is similarly unbounded. This is precisely the construction that the Third Circuit rejected in affirming the Commission's order as having a "definite meaning." 503 F.2d at 1273.

Thus, we have two appellate courts interpreting the same agency orders in flatly inconsistent and irreconcilable ways—the one court agreeing with the agency which issued the order and the other (the D.C. Circuit) deriving a contrary meaning not from the face or context of the order but from the court's earlier opinion (*Execunet I*) on a "very different issue" (Section 214 facilities authorization). (Pet. App. 27B n.59.) Moreover, each court was governed by a dif-

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obligation extended to private line services and no farther. (Pet. App. 32C-33C, 37C.) The Third Circuit's repeated references to "private line" or "specialized" services (503 F.2d at 1254, 1256, 1259, 1260, 1261, 1273) amply testify to the court's reliance on the parties' representations.

ferent understanding of Section 201(a). The Third Circuit viewed an FCC hearing and "public interest" finding as "condition[s] precedent" to imposition of any interconnection order. 503 F.2d at 1270. Conceding that the FCC had not yet made that "public interest" finding (Pet. App. 8B), the D.C. Circuit necessarily viewed Section 201(a) differently.

The conflict between the circuits will have continuing adverse consequences. Not only will the Commission face the continued dilemma of whether to obey the one circuit or the other, but affected parties appealing future Commission decisions may expand the controversy to other circuits.[29] To ensure a rational and consistent nationwide communications policy in this vital area, the Court should grant certiorari and resolve the conflict between the circuits.[30]

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[29] For instance, if MCI or another specialized carrier files tariffs which presuppose interconnection with non-Bell operating companies for MTS/WATS-like services, the Commission will have to determine whether such interconnection was required by the 1971 *Specialized Common Carrier Services* decision. If the Commission, relying upon *Execunet II*, rules that interconnection was so required, the affected telephone companies may well seek reversal in the Third or another circuit.

[30] The conflict with *Bell Tel. Co. of Penn.* is clearer and more direct in this case than in *Execunet I*. In *Execunet I*, the D.C. Circuit had not purported to construe the interconnection orders at stake in *Bell Tel. Co. of Penn.* By contrast, in *Execunet II*, the D.C. Circuit construed the very same orders previously and differently construed by the Third Circuit. Moreover, the conflict between the circuit's views of Section 201(a) became manifest only when the D.C. Circuit explictly dealt with interconnection.

2. Expansion of the Execunet I Mandate.

The court of appeals summarily required interconnection in an order purporting merely to enforce its previous mandate. But the earlier decision had resolved only two issues:

> whether and to what extent Section 214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly exercised whatever authority it may have under Section 214.

(Pet. App. 21B.) It answered the first in the affirmative; but it reversed the Commission on the sole ground that the agency had not "properly exercised" its authority under Section 214(c) to restrict MCI's certificates because it had not made the requisite public interest finding. (Pet. App. 22B-31B.)

The court did not decide anything about interconnection in *Execunet I*.[31] The issue was not raised either at the agency or in the review proceeding.[32]

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[31] The *Execunet I* opinion mentioned interconnection only in a footnote attempting to distinguish the *Bell Tel. Co. of Penn.* decision as involving "a very different issue" from the *Execunet I* case—namely, the scope of AT&T's interconnection obligation. (Pet. App. 27B n.59.)

[32] The court of appeals appears in *Execunet II* to suggest some kind of estoppel because the FCC did not rely upon the interconnection issue in its 1976 cease and desist order. (Pet. App. 12A-13A.) But there was no reason for the FCC to address that issue. As the court of appeals apparently concedes, the FCC firmly believed that MCI had limited authorizations, and that the pertinent inquiry was whether Execunet

Indeed, the court went out of its way to deny that its holding was broad. It disclaimed any finding that the public interest required Execunet, it left such questions to further proceedings at the FCC, and it stated its holding narrowly as limited to a procedural failure on the part of the FCC. (Pet. App. 31B, 32B.)[33]

Now the court of appeals appears to say that *Execunet I* mandates interconnection that is coextensive with MCI's unrestricted certificates. The court apparently assumes that its decision required the removal of any and all obstacles to MCI's implementation of Execunet service, without regard to what the Commission might have ordered and, if necessary to achieve that end, without regard to the statutory prerequisites to an interconnection order. 47 U.S.C. § 201(a).[34]

But the reviewing court does not dictate a result; nor does it sit to vindicate expectations or the ulti-

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was beyond the limit. When the FCC found in the original decision that Execunet was not an authorized service, in its view of the specialized carrier policy, its inquiry was at an end.

[33] The court's characterization of its own opinion supported the oppositions to the petitions for certiorari, which argued that the decision was so narrow and unassuming as not to warrant Supreme Court review.

[34] In a *per curiam* memorandum attached to an order staying its *Execunet II* decision, the court reveals the sweeping view it now takes of *Execunet I*. The court states, in effect, that the Commission may not take any action, pending "final rules" after agency rulemaking, that would be inconsistent with what the court has established as "MCI's right to enter the market now." (Pet. App. 10E.)

mate purposes of litigants. Its function ends when "an error of law is laid bare." At that point, "the matter once more goes to the agency for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952). *Execunet I* properly controls only those matters the court considered and decided directly. See *Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The words of the opinion, and not the private thoughts of the judges, constitute the mandate.[35] The words and the reasoning of *Execunet I* do not require or justify the court of appeals' interconnection order.

This Court should grant the writ, in exercise of its supervisory power over inferior courts, to construe the *Execunet I* mandate in the accepted and usual course of judicial proceedings, on the basis of matters actually considered and decided. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 379; *National Labor Rel. Bd.* v. *Donnelly Co.*, 330 U.S. 219, 227; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

3. Judicial Intrusion into Administrative Process.

In addition to ignoring the controlling decision of the Third Circuit and improperly expanding its own mandate, the court of appeals intruded into the

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[35] Litigants may not be left to speculate as to the requirements of the mandate. See *National Labor Relations Board* v. *Donnelly Co.*, 330 U.S. 219, 229 (1947).

FCC's decision-making process by directly ordering carrier interconnection to implement judge-made communications policy. As the Third Circuit said in *Bell Tel. Co. of Penn.*:

> Section 201(a) of the Communications Act requires (as a condition precedent to the issuance of interconnection orders) that the FCC make a finding that the proposed interconnection will be "necessary or desirable in the public interest."

503 F.2d at 1270. Although the FCC plainly has had no hearing on MTS/WATS interconnection and has made no finding that such interconnection is "necessary or desirable in the public interest," *Execunet II* required immediate interconnection. The court of appeals has no authority either to disregard the statutory requirements or to assume the Commission's function.

Congress gave the FCC the responsibility to make and implement communications policy. That includes the big decisions, such as *Specialized Common Carrier Services, supra,* 29 FCC 2d 870, and the smaller ones that carry out policy in a consistent and rational manner. All its decisions are subject to judicial review; and if error is found, the FCC must take corrective action. But the decisions must be the FCC's. When the court of appeals ordered interconnection, it "overstepped the bounds of its reviewing authority," *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), and "usurped an administrative function,"

Federal Power Commission v. *Idaho Power Co.*, *supra*, 344 U.S. at 20.

The order to interconnect underscores a more fundamental problem in this case: the court of appeals has made important communications policy and will not countenance any action by the FCC—even lawful and reasonable action—that might frustrate the "intended effect of [the court's] decree." (Pet. App. 18A.)[36] But as we pointed out above, the function of the reviewing court ends when agency error is "laid bare." At that point, the Commission once again must enforce "the legislative policy committed to its charge." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 145. The court of appeals, in rejecting the FCC's interconnection ruling, appears to claim, in effect, that "the Commission lacks power to enforce the standards of the Act in this proceeding." See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203-04 (1947). Such a claim "deserves rejection." *Id.*[37]

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[36] It seems fair to characterize the court's current view of *Execunet I* as a judicial rulemaking proceeding in which the FCC was permitted to participate and which established, as a matter of policy, "MCI's right to enter the market now." (Pet. App. 10E.) As this Court has pointed out, it is all too easy for a reviewing court to judge agency action "in the light of policies the court, rather than the agency, seeks to implement. . . ." *Atchison, T. & S.F.R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 809 (1973). But this approach to judicial review improperly interferes with Congress' assignment of particular functions to agencies. *Id.*

[37] *Execunet II* also violates the *Chenery* principle that agencies may act either by general rule or by individual order. 332

The court of appeals' interconnection order was an exercise of an administrative function, plainly in violation of consistent rulings in this Court. The Court should grant the writ to restore the appellate review process to its proper bounds.

4. Error in Statutory Construction.

The FCC properly determined in the declaratory ruling that it had not made a public interest finding to justify an interconnection order for MTS/WATS-type services. (Pet. App. 36C-43C.) The court of appeals also eschewed any finding that MTS/WATS competition is in the public interest. (Pet. App. 32B.) Yet, *Execunet II* required interconnection in the face of a statute that expressly forbids such an order in the absence of an affirmative public interest finding. 47 U.S.C. § 201(a). Because no one has made that finding, the court's order rests upon an error in statutory construction.

U.S. at 199-204. The court stated, apparently as an independent ground for its order, that "tariff and rulemaking proceedings" were the "exclusive means" by which the FCC could affect the services provided by specialized carriers. (Pet. App. 16A, 17A, 4E.) But the agency "must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective." 332 U.S. at 203. The Commission surely cannot be faulted for acting on AT&T's petition for a declaratory interpretation of its own outstanding orders, simply because the court of appeals contemplated rulemaking as the "exclusive means" for further agency action in this area. Nor, for that matter, could the FCC ignore its statutory duties under Section 201(a) even though *Execunet I* had overlooked that provision.

The court apparently believed that the logic behind its *Execunet I* interpretation of Section 214 also controlled the interpretation of Section 201(a). A comparison of the two provisions, however, leads to a contrary conclusion. Section 214(c) says that the FCC "*may* attach to issuance of the [214] certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c) (emphasis added). In contrast to this permissive language which helped form *Execunet I*'s view that such conditions are the exception and not the rule (Pet. App. 9A n.10), Section 201(a) makes it clear that the FCC *must* provide an "opportunity for hearing" and make a "public interest" finding before ordering interconnection.

The essentional rationale of *Execunet I* was that, under Section 214, once facilities are authorized, a carrier may offer any services with those facilities unless the FCC imposes an express service-limiting condition on the authorization. It does not follow, however, that interconnection orders under Section 201(a) are similarly unbounded.[38] It is one thing to au-

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[38] Our argument here is independent of the argument that the Third Circuit definitively construed the scope of the interconnection order in *Bell Tel. Co. of Penn., supra,* 503 F.2d 1250. We point out, however, that both statutory and decisional law indicates that the Third Circuit jurisdiction became exclusive when the petition for review of the interconnection orders was filed there, and that the decision of that court precluded any "collateral attack" on its judgment in new litigation between the same parties. 28 U.S.C. § 2349; *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 339-40 (1958).

thorize a carrier to construct and use its *own* facilities in whatever way it may wish. But, as the "opportunity for hearing"/"public interest" finding scheme of Section 201(a) attests, it is quite a different thing to require access to and use of another company's facilities for any possible service. In recognition of the infringement on the business affairs of a separate company, Section 201(a) permits the FCC to require interconnection only to the extent "such action [is] necessary or desirable in the public interest." [39]

In *Execunet I*, the court reversed the FCC because the agency had failed, in the court's view, to make an "affirmative determination" of public interest need for restrictions on MCI's authorizations. (Pet. App. 24B-31B.) The court stated:

> We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision. Nonetheless, it is readily apparent that *failure to consider the public interest ramifications* of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative determination that the "public convenience and

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[39] *Execunet II* makes much of the fact that AT&T did provide interconnections during the pendency of *Execunet I*. A carrier's previous voluntary interconnection arrangement might be a proper consideration for the FCC to weigh in determining whether compulsory interconnection thereafter is "necessary or desirable in the public interest." But such prior practice is hardly justification for a court to usurp the FCC's function of balancing that consideration against other competing public interest factors.

> necessity may require" a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application.

(Pet. App. 27B-28B. Emphasis added.)

But if a "failure to consider the public interest ramifications" could not satisfy a statutory requirement of affirmative public interest findings in Section 214(c), it follows that the same "failure" would not satisfy the requirement of public interest findings that are a prerequisite to an order to interconnect in Section 201(a). We submit that the court's approaches to the requirements of public interest findings in these two statutes are irreconcilable.[40]

The Commission's declaratory ruling, moreover, proceeded from a construction of the agency's own interconnection orders, as those orders had been interpreted on direct judicial review and as the FCC had consistently read and applied them. The agency's reading of its own Act and particularly of its own decisions is entitled to deference in the courts, and must be given controlling weight unless it is plainly erroneous. *Red Lion Broadcasting Co.* v. *FCC*, 395

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[40] The FCC argued in *Execunet I*, of course, that it could impose service restrictions on certificates without an affirmative public interest finding by virtue of the statute's provision for granting "such certificate as applied for." That position is entirely consistent with our argument that Section 201(a), which contains no such alternative route to ordering interconnection, requires an affirmative public interest finding that the FCC has not made as to interconnection for MTS/WATS-type services.

U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965). In this case, the court of appeals treated the agency's construction almost with contempt: "[The Commission's declaratory ruling] reflected *only* the Commission's interpretation of the statutory provisions of the Communications Act and of earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*." (Pet. App. 10E. Emphasis added.) Under the proper test, if the FCC's interpretations of the statutory provisions and its own earlier decisions are reasonable—as they plainly are—this Court "must reverse the decision of the Court of Appeals." *Udall* v. *Tallman*, *supra*, 380 U.S. at 18. The court of appeals may not override agency action "simply because the court is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Def. Coun., Inc.*, No. 76-419 (decided April 3, 1978), slip opinion p. 36.

CONCLUSION

The Court should grant the writ and review the *Execunet II* order.

Respectfully submitted,

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August, 17, 1978

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No. 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORP., ET AL.

PETITIONER'S APPENDIX

ROBERT R. BRUCE,
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DAVID J. SAYLOR,
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APPENDIX A

United States Court of Appeals for the District of Columbia Circuit
SEPTEMBER TERM, 1977

No. 75-1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.
AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL., INTERVENORS.

Filed April 14, 1978

Before: WRIGHT, *Chief Judge;* TAMM and WILKEY, *Circuit Judges.*

ORDER

Upon consideration of petitioners' motion requesting this Court to enter an order directing compliance with this Court's mandate previously issued in this proceeding, of petitioners' motion for expedited consideration, of the oppositions of intervenors United States Independent Telephone Association and American Telephone and Telegraph Company, of the response of intervenor Southern Pacific Communications Company, of petitioners' supplements to their motion, of the response of respondent Commission, of the reply of intervenor United States Independent

Telephone Association to the response of Southern Pacific Communications Company, of petitioners' reply to the opposition of American Telephone and Telegraph Company, of the supplemental opposition of American Telephone and Telegraph Company to the response of intervenor Southern Pacific Communications Company to the petitioners' motion, of the reply of intervenor Southern Pacific Communications Company to the various oppositions, and of the letter of counsel for respondent Commission advising of additional authorities, it is

ORDERED by the Court that petitioners' motion for an order directing compliance with the mandate of this Court, previously issued, is granted for the reasons set forth in the opinion for the Court filed herein this date.

Per Curiam.

For the Court:

GEORGE A. FISHER,
Clerk.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY, INTERVENORS

Motion for an Order Directing Compliance With Mandate

Filed April 14, 1978

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Michael H. Bader, William J. Byrnes, Kenneth A. Cox, and *Raymond C. Fay* were on the pleadings for petitioners.

Robert R. Bruce, General Counsel, *Daniel M. Armstrong,* Associate General Counsel, and *John E. Ingle,* Counsel, Federal Communications Commission, were on the pleadings for respondents.

Paul J. Berman, Michael Boudin, and *F. Mark Garlinghouse* were on the pleadings for intervenor American Telephone and Telegraph Company.

Before WRIGHT, *Chief Judge,* and TAMM and WILKEY, *Circuit Judges.*

Opinion for the court filed by *Chief Judge* WRIGHT.

WRIGHT, *Chief Judge*: Petitioners here, MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. (hereinafter, collectively, MCI), request this court to issue an order directing the Federal Communications Commission (FCC) and the American Telephone & Telegraph Company (AT&T) to comply with our mandate in *MCI Telecommunications Corp. v. FCC,* 561 F.2d 365 (D.C. Cir. 1977), *cert. denied,* —— U.S. ——, 46 U.S. L. WEEK 3446 (January 16, 1978) (hereinafter *Execunet*). This motion by MCI was prompted by a declaratory ruling issued by the Commission, at the request of AT&T, on February 23, 1978, holding that AT&T is under "no obligation" to provide the local physical interconnections necessary for MCI's Execunet service.[1] MCI argues that this ruling is inconsistent with and violative of our *Execunet* decision, and that under

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[1] *In the Matter of Petition of American Telephone and Telegraph Company for a Declaratory Ruling and Expedited Relief,* FCC 78-142, Memorandum, Opinion and Order, Adopted February 23, 1978, Released February 28, 1978 (hereinafter FCC Declaratory Ruling).

our mandate AT&T *is* required to provide interconnections for Execunet. For the reasons set forth below, we agree, and we order the parties to comply with our mandate.

I. BACKGROUND

The motion to direct compliance before us now is the most recent stage in the long series of proceedings and litigation in which MCI has attempted to secure and preserve its authority to offer Execunet service.[2] Since the seminal FCC *Specialized Common Carrier* decision, *Specialized Common Carrier Services*, 29 FCC2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Com'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (hereinafter *Specialized Carrier*), MCI has met with almost continuous resistance from AT&T in its efforts to provide communications services. We had thought that this process finally culminated in our *Execunet* decision upholding MCI's authority to offer Execunet pending further rulemaking by the Commission. Now, however, we are faced with a new effort by AT&T, with the approval of the Commission, to arrest the development of Execunet service, and the question for immediate disposition is whether protection of the integrity of our *Execunet* mandate requires that this new effort be terminated through an order directing compliance with our mandate. We believe it does.

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[2] With Execunet a subscriber with a push-button telephone is able to reach any telephone in a distant city served by MCI by dialing a local MCI number followed by an access code and the number in the distant city. Execunet subscribers are billed on a time and distance basis for each call, subject to a monthly minimum. *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 367 & n.3 (D.C. Cir. 1977), *cert. denied*, —— U.S. ——, 46 U.S. L. WEEK 3446 (Jan. 16, 1978) (hereinafter *Execunet*); *MCI Telecommunications Corp.*, 60 FCC2d 25, 26 n.1 (July 13, 1976).

Since the course of all of these earlier proceedings is set out in some detail in our *Execunet* decision,[3] our purpose here is only to outline briefly the background necessary to consideration of this motion. In *Specialized Carrier, supra*, the Commission sought to determine by rulemaking "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field * * *." 29 FCC2d at 878. The Commission answered that question affirmatively,[4] but did not seek to define precisely the

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[3] *See Execunet, supra* note 2, 561 F.2d at 367-373. *See also Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1254-1263 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[4] As to this question the Commission concluded:

> [T]here is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

Specialized Common Carrier Services, 29 FCC2d 870, 920 (1971), *aff'd sub nom. Washington Utilities & Transportation Com'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (hereinafter *Specialized Carrier*). The Commission went on to address the question of "the appropriate means for local distribution of the proposed services," *Notice of Proposed Rulemaking*, 24 FCC2d 318 (1970), concluding:

> 157. We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and

boundaries of "the specialized communications field." [5]

Specialized Carrier served as the basis for the Commission's later grants, under 47 U.S.C. § 214 (1970), of facilities authorizations to carriers, including MCI, to provide microwave communications services. AT&T, however, refused to provide interconnections necessary for the specialized carriers to furnish these services. This refusal led MCI to seek and secure from the Commission both a cease and desist order against AT&T and an affirmative order that AT&T was required to provide any physical connections "essential" to the rendition of "all" the services which any of the specialized common carriers "presently or hereafter" are authorized to offer. *Bell System Tariff Offerings*, 46 FCC2d 413 (1974), *aff'd*

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also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, *"where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors."* In view of the representations of AT&T and GT&E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.

Specialized Carrier, supra, 29 FCC2d at 940 (emphasis added; footnote omitted).

[5] *See Execunet, supra* note 2, 561 F.2d at 371, 379 n.68 ("to the extent that any definition of a specialized common carrier emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public").

sub nom. Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

MCI filed a tariff revision including rates for Execunet service in September 1974. That tariff was rejected by the Commission at the request of AT&T. MCI immediately sought a stay of the Commission's order pending judicial review. A stay was initially granted, then later modified in light of the opposition of the FCC and AT&T. As modified the stay permitted MCI to continue to serve its present customers but prohibited any solicitation of new customers or any expansion of service.[6] In seeking and securing this modification of the stay—as well as in its opposition to the grant of the original stay—AT&T forcefully argued that a broad stay would permit MCI to compete with AT&T's long distance service in high density, high profit areas, and that this would have a substantial adverse impact on AT&T and on the public interest. According to the pleadings filed in this court by AT&T, such competition would undermine AT&T's practice of determining long distance rates through cost averaging and would result in substantial increase in costs in low density areas.[7]

After an initial remand at the Commission's request for further proceedings on the merits, we reversed the FCC's rejection of the Execunet tariff. We held that under the Communications Act the tariff system provides the usual mechanism for initiation of new services to be provided on previously authorized facilities.[8] Under this

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[6] *See Execunet, supra* note 2, 561 F.2d at 369 & n.18.

[7] *See* Memorandum of AT&T in Opposition to Petitioners' Motion for Stay Pending Review, July 14, 1975, at 44-47; Motion of AT&T to Dissolve or Modify the Stay and for Expedited Review, August 18, 1976, at 24-29.

[8] *Execunet, supra* note 2, 561 F.2d at 374, *citing AT&T v. FCC*, 487 F.2d 965, 870-881 (2d Cir. 1973).

mechanism a carrier files a tariff for the new service and, subject to a possible stated suspension period, is permitted to implement that service until and unless the Commission determines that the service is not in the public interest.[9] The only limitation on the carrier's ability to make use of tariff filings to initiate new services relevant to this case is found in Section 214(c) of the Act, 47 U.S.C. § 214(c) (1970), which permits the Commission, in granting facilities authorizations, to limit the services which may be provided on facilities which it authorizes.[10]

The Commission argued in *Execunet* that its *Specialized Carrier* decision implicitly restricted the facilities authorizations of specialized carriers to "private line" services, that Execunet is not such a "private line" service, and that MCI therefore could not implement this service through a tariff filing. In support of its position the Commission emphasized that its analysis of competitive effects in *Specialized Carrier* assumed that the specialized carriers would be limited to offering "private line" services.[11]

We rejected the Commission's arguments, holding that Section 214 requires an affirmative determination to restrict a carrier's facilities authorization, and that no such determination was made in *Specialized Carrier*. In reaching our conclusion we placed emphasis on the Commis-

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[9] The relevant tariff provisions are found in §§ 203-205 of the Communication Act, 47 U.S.C. §§ 203-205 (1970). *See Execunet, supra* note 2, 561 F.2d at 374 n.44.

[10] Section 214(c) permits the Commission to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c) (1970). *See Execunet, supra* note 2, 561 F.2d at 376-377 & n.56.

[11] *Execunet, supra* note 2, 561 F.2d at 37 & n.58.

sion's staff report which formed the basis for the *Specialized Carrier* decision. As to the competition argument, we found that the staff report "ruminated more broadly [than the Commission suggested] on the issues posed by revenue diversion and it appeared highly skeptical of the validity of AT&T's overall argument." 561 F.2d at 378. Further, we noted that the staff report "dealt explicitly with the question of how the Commission ought to deal with possible adverse impacts of service offerings other than those which were before the Commission in the *Specialized Common Carrier* decision." *Id.* at 378-379. We found that "[t]he undeniable import of the staff's analysis is that questions related to the future impact of specialized carrier service offerings other than those immediately at hand in the *Specialized Common Carrier* case should be resolved in other proceedings—in tariff proceedings, upon license renewal, or by future rulemaking." *Id.* at 379.

AT&T, as well as the Commission, petitioned for certiorari, arguing, *inter alia*, as they had before this court, that our decision would result in vigorous competition over high density routes, with potentially adverse effects on the public interest as well as on AT&T.[12] Certiorari was denied on January 16, 1978.[13]

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[12] AT&T Petition for Certiorari, *MCI Telecommunications Corp. v. FCC* (Sept. 1977), at 29-30 ("If the lower court's decision stands, the telephone companies will be threatened with a massive diversion of MTS traffic from the switched network. This diversion can occur at an extraordinary rate—literally in a matter of months—because the specialized carriers have thousands of intercity circuits in operation and they utilize existing local distribution facilities already in place. Past experience confirms the severity and speed of this threat."), *quoted in* MCI Petition for Compliance before the FCC, at 7.

[13] —— U.S. ——, 46 U.S. L. WEEK 3446 (Jan. 16, 1978).

Hours after the Supreme Court's denial of certiorari AT&T announced its intention to cease providing any additional interconnections for Execunet or similar services, and filed with the Commission a petition for declaratory ruling that it was under "no obligation" to furnish MCI or any other specialized carriers with any "additional" physical connections for Execunet-type services. The Commission considered AT&T's petition on an expedited basis, and on February 23, 1978 it adopted a declaratory ruling in substantial accord with AT&T's request.[14]

II. The Commission's Declaratory Ruling is Inconsistent With the *Execunet* Mandate

The local physical interconnections which AT&T now refuses to provide for Execunet service are admittedly essential to MCI's ability to offer that service. As a result, AT&T's refusal to provide "additional" connections, upheld in the Commission's declaratory ruling, means that MCI is in effect no better off than it was during the entire course of the litigation in this court: notwithstanding our favorable decision, it is unable to expand Execunet. Moreover, nothing in the Commission's ruling, or in AT&T's request, establishes any legal basis for a greater interconnection obligation on AT&T with respect to maintenance of physical connections already in place than with respect to "additional" connections,

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[14] The petition for a declaratory ruling was granted, and AT&T declared without obligation to interconnect, with respect to prior Commission orders, the provisions of the Communications Act, and the mandate of this court in *Execunet*. The petition was denied only "insofar as it requests a determination with respect to the scope of petitioner's interconnection obligations to specialized common carriers, if any, under the Sherman Act, the common law, or any federal or state statute other than the Communications Act." FCC Declaratory Ruling, *supra* note 1, ¶ 83.

with the result that MCI might well find itself in the near future unable even to provide Execunet to its existing customers.[15]

Having successfully litigated the question of its right to provide Execunet service, MCI certainly has good cause to feel that this subsequent turn of events engineered by the Commission and AT&T is strikingly unfair. Of course, as AT&T and the Commission so vigorously argue, litigation in the courts does not always provide the victor with all that he might wish, or with all that he expected or thought he had won. But the fact of the matter is that our *Execunet* decision *did* clearly contemplate—by virtue of *AT&T*'s representations and actions—that AT&T was required to provide interconnections for Execunet service.

Until the Supreme Court denied certiorari in *Execunet*, AT&T provided MCI with the interconnections necessary for Execunet service without any form of protest or objection. Never in the proceedings before this court did AT&T even suggest that it was not required to provide these connections, or that the question of MCI's authority to provide or expand its Execunet service was, as a practical matter, of no consequence since AT&T could and would refuse to provide the essential interconnections should we decide in MCI's favor. Quite to the contrary, in securing the modification of our original stay, in its briefs and arguments to this court, and in its petition for certiorari, AT&T consistently emphasized that a

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[15] Indeed, the Commission's order does not even restrict its holding to "additional" connections: it concludes "that our prior Section 201(a) orders do not direct the petitioners to provide interconnection of facilities or services to any specialized common carrier to enable such a specialized common carrier to provide any service which is substantially equivalent to MTS or WATS." *Id.* ¶ 79.

decision in favor of MCI *would* lead to vigorous and adverse competition.[16]—a result which would occur only if AT&T was required to provide the necessary interconnections for Execunet. AT&T expected and encouraged this court to take account of these representations in reaching our decisions in the Execunet matter; certainly, it did not assume that in so doing we would at the same time ignore the underlying assumptions supporting the claims of competition. Indeed, even now AT&T does not deny that it is required to provide interconnections for existing Execunet service; it contends *only* that it is not required to provide any "additional" connections,[17] notwithstanding its earlier representations necessarily assuming the contrary, upon which our *Execunet* decisions were premised, as well as the absence of any apparent legal basis for distinguishing existing connections from additional ones.

In view of this background, AT&T's current refusal, with the approval of the Commission, to provide interconnections to MCI does not simply raise questions of fairness *vis-a-vis* MCI; it also raises questions as to the propriety of allowing respondents here to renounce a position and obligation which they assumed throughout the course of the *Execunet* proceedings. But we need not rest our grant of MCI's compliance motion on the practical consequences involved here or on considerations of fairness and estoppel. For while it is true, as AT&T strongly emphasizes, that our *Execunet* decision is not addressed explicitly to the interconnection issue or to AT&T's obligation to provide interconnection[18]—a fact

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[16] *See* notes 7 & 12 *supra.*

[17] *See* Opposition of AT&T to MCI Motion for an Order Directing Compliance With Mandate, *MCI Telecommunications Corp. v. FCC* (March 2, 1978), at 10.

[18] *See id.* at 12-14. *See also* Response of Federal Communications Commission to MCI Motion for an Order Directing

which is hardly surprising, given the background of this case and the apparent assumption by all the parties, as well as this court, that such an obligation was in force—it is also true that our analysis and decision of the *Execunet* case is plainly inconsistent with the analysis and ruling of the Commission on February 23, 1978 holding AT&T under "no obligation" to provide interconnections for Execunet.

In reaching this conclusion the Commission addressed its analysis to two questions: whether the Commission had previously directed AT&T to provide these services pursuant to an order under Section 201(a) of the Communications Act; and, if not, whether AT&T is under an obligation to provide interconnection apart from a Section 201(a) order. While serious questions have been raised by the Department of Justice as to the correctness of the Commission's disposition of the second question,[19] we need not address these doubts here, since it is the Commission's analysis and resolution of the first question which gives rise to the inconsistency with our *Execunet* mandate. For in concluding that its prior orders do not require AT&T

Compliance With Mandate, *MCI Telecommunications Corp. v. FCC* (March 6, 1978), at 7 ("There was no mention of interconnection rights or obligations, because none of the parties had raised these questions either before the Commission or in the Court.").

[19] *See* Comments of the United States Department of Justice, *In the Matter of Petition of American Telephone and Telegraph Company for Declaratory Ruling and Expedited Relief*, submitted as Appendix A to MCI Reply to Oppositions, *MCI Telecommunications Corp. v. FCC* (March 9, 1978), at 7, 9 (arguing, *inter alia*, that "AT&T totally failed to make any factual showing of harm in its petition seeking to invoke Commission protection against competition in the intercity services market," as well as that "[r]ecent court decisions make it clear that local telephone companies, including AT&T subsidiaries, are affirmatively obliged to offer local interconnection or loop services to other carriers, including MCI, to facilitate lawful services").

to provide interconnections for Execunet, the Commission construes narrowly and restrictively the very same issues and decisions which were broadly construed by this court in *Execunet.*

For purpsoses of the Commission's first question, the critical interconnection order is the *Bell System Tariff Offerings* order, *supra,* requiring AT&T to provide interconnection for "all" of the services which any of the specialized carriers "presently or hereafter" are authorized to offer. In its declaratory ruling the Commission sought to construe this order as limited to "presently or hereafter authorized *private line* service," *In the Matter of Petition of AT&T for Declaratory Ruling and Expedited Relief,* FCC 78-142, Memorandum, Opinion and Order, Adopted February 23, 1978, Released February 28, 1978, ¶ 58 (hereinafter FCC Declaratory Ruling), allegedly relying on a decision of the Third Circuit to that effect. *See infra.* In the very next paragraph of its decision, however, the Commission recognized "that the *Specialized Carrier* decision encompassed specialized communication services other than those which theretofore had been described as 'private line services' " and acknowledged that "private line" had emerged as shorthand for the broader term "specialized communication service" because of the particular context in which the interconnections issues were most frequently raised. *Id.* ¶259. Thus the Commission continued:

> We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* interstate communication services, including switched digital services such as those developed by Datran. What is germane to the present proceeding, however, is a determination as to what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff*

> *Offerings*, and *Bell Tel. Co. of Pennsylvania*. We believe it is clear that MTS and WATS services, and therefore services by other names which are the functional equivalent of MTS and WATS, were excluded from both the considerations and holdings of these proceedings. * * *

Id. (emphasis in original). Phrased in these terms the Commission's reasoning is wholly at odds with that of this court in *Execunet*. For in *Execunet* we held that MCI's facilities authorizations encompassed Execunet service *precisely because Specialized Carrier did not explicitly and affirmatively exclude this type of service from consideration*. In relying on exactly the opposite conclusion to support its declaratory ruling, the Commission acts in direct and explicit contradiction to our *Execunet* decision.

The inconsistency between *Execunet* and the Commission's declaratory ruling persists at the more general level as well. The thrust of our entire opinion and decision in *Execunet*, derived in part from our reading of the Commission staff report, was that *Specialized Carrier* represented a broad decision by the Commission to allow carriers such as MCI to enter the market and compete with AT&T, subject only to later limitations based on public interest determinations in tariff or rulemaking proceedings.[20] In its February 23rd ruling, however, the Commission narrowly construed *Bell System Tariff Offerings*, which was based on *Specialized Carrier*, to exclude Execunet interconnections from those which AT&T was required to provide; and it relied on interconnection obligations—as opposed to tariffs or rulemaking—effectively to limit the services which MCI and other carriers were authorized to provide by the *Specialized Carrier* decision.

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[20] *Execunet*, *supra* note 2, 561 F.2d at 378-379. *See* pp. 7-8 *supra*.

Both of these positions are clearly inconsistent with the basic themes of our *Execunet* decision. For the expansive interpretation of *Specialized Carrier* we advanced in *Execunet* clearly mandates an equally expansive view of the scope of the interconnection obligations of AT&T which were defined by that decision. And in fact the interconnection order which the Commission issued on the basis of *Specialized Carrier*, as well as its discussion of interconnection in *Specialized Carrier* itself,[21] reflected the broad reading of that decision to which we have adhered: as noted earlier, it required AT&T to furnish interconnection for all "presently or hereafter authorized" services provided by the specialized carriers.[22] Similarly, our emphasis on tariffs and ratemaking as the exclusive means for future limitations on the specialized carriers' development[23] clearly contemplated that the carriers would be free to expand their service offerings—and would be afforded the necessary interconnections—until and unless it was found that the public interest demanded otherwise. The Commission's narrow construction of AT&T's existing interconnection obligation is not only theoretically inconsistent with this position, but also means in practice that a specialized carrier *cannot* implement new offerings until and unless it is able to es-

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[21] *See* note 4 *supra, quoting Specialized Carrier*, 29 FCC2d at 940 ("established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier").

[22] *Bell System Tariff Offerings*, 46 FCC2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pennsylvania v. FCC, supra* note 3.

[23] *Execunet, supra* note 2, 561 F.2d at 378-379. *See* pp. 6-8 *supra*.

tablish that the public interest mandates the services[24] and that a new order should therefore be issued directing AT&T to provide interconnections. This twists the issues we contemplated in this case beyond recognition; it deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree.

In our view, then, the only conclusion to the issues presented here which is consistent with our reasoning and holding in *Execunet* is that the Commission decisions in *Specialized Carrier* and *Bell System Tariff Offerings* impose upon AT&T an obligation to provide interconnections for Execunet. In holding otherwise in its February 23rd declaratory ruling, therefore, the Commission acted inconsistently with our *Execunet* mandate. And in refusing to provide these interconnections to MCI, AT&T is acting inconsistently with the view of its legal obligations reflected in our *Execunet* decision.

III. THE *Bell Telephone* DECISION

One final argument remains to be addressed. The Commission has asserted that the position it has taken in this action is mandated by the decision of the Third Circuit in *Bell Telephone Co. of Pennsylvania v. FCC*, *supra*, and that this position represents the only means by which the Commission can simultaneously comply with the decisions

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[24] *Compare Execunet*, *supra* note 2, 561 F.2d at 374 ("it is well recognized that the tariff provisions of the Communications Act (Sections 203-205, 47 U.S.C. §§ 203-205), like the cognate sections of the Interstate Commerce Act * * *, embody a considered legislative judgment that carriers should in general be free to initiate and *implement* new rates or services over existing communications lines unless and until the Commission, after hearing, determines that such rates or practices are unlawful, subject only to a limited period of suspension set out in the statute") (footnotes omitted; emphasis in original).

of the two circuits.[25] As we have already made clear, however, the Commission's February 23rd decision does not effectuate compliance with our *Execunet* decision. Nor can the Commission claim that it was required to decide as it did in order to comply with *Bell Telephone*. For in our view there is absolutely no conflict between the *Execunet* and *Bell Telephone* decisions; the latter in no way compels or even provides support for the Commission ruling that AT&T is under no obligation to provide interconnections for Execunet.

The interconnection orders under review in *Bell Telephone* were issued by the Commission after AT&T refused to provide to MCI the interconnections necessary for FX and CCSA service.[26] FX, a service similar to though somewhat more limited than Execunet, allows an individual in one state in effect to maintain a local phone in another state and thereby avoid making or receiving traditional long distance calls from that state. For example, an individual in Washington with FX can be reached by telephone subscribers in New York City and can himself reach New York City subscribers through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area. CCSA, a Common Control Switching Arrangement, serves to link the various offices of a large company through switches on a local telephone company's premises.[27] In the orders being challenged in *Bell Telephone* the Commission had first concluded that its prior actions—notably, its *Specialized Carrier* decision—had imposed upon AT&T

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[25] *See* FCC Declaratory Ruling, *supra* note 1, ¶¶ 56, 61; Response of Federal Communications Commission, *supra* note 18, at 20.

[26] *See Bell Telephone Co. of Pennsylvania v. FCC*, *supra* note 3, 503 F.2d at 1254-1259.

[27] *Id.* at 1254 n.4, quoting *Bell System Tariff Offerings*, *supra* note 22, 46 FCC2d at 418 & n.5.

the obligation to provide FX and CCSA interconnections to MCI and other specialized carriers.[28] Lest its prior orders were not clear, however, the Commission again reviewed the interconnection question, concluding that "achievement of our objective that competition in the provision of interstate private line communications services be on a full, fair and nondiscriminatory basis requires the issuance of *broad interconnection orders*. Our orders herein therefore make clear that Bell is to provide interconnection for *all of the authorized services of the specialized carriers*, including FX and CCSA." 503 F.2d at 1259, *quoting* 46 FCC2d at 426-427 (emphasis added).

An essential question posed by AT&T's petition for review in *Bell Telephone* was whether the Commission's order was the first time that AT&T had been directed to provide FX and CCSA interconnections, or whether, as the Commission argued, AT&T's obligations to provide these connections were fixed by *Specialized Carrier* and the *Bell Telephone* orders merely represented the Commission's method of enforcing a previously announced mandate.[29] The Third Circuit adopted the Commission's view. The court noted that *Specialized Carrier* contained no specific reference to FX or CCSA, but it construed that decision broadly to include the services in question.[30] In

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[28] *Bell System Tariff Offerings, supra* note 22, 46 FCC2d at 426-427. *See also* Letter from Bernard Straussburg, Chief of the Common Carrier Bureau, FCC, to AT&T, August 31, 1973 ("it is our view that, as requested by MCI, the associated Bell companies are required to permit interconnection or provide local channel arrangements to MCI"), *quoted in Bell Telephone Co. of Pennsylvania v. FCC, supra* note 3, 503 F.2d at 1256.

[29] *Bell Telephone Co. of Pennsylvania v. FCC, supra* note 3, 503 F.2d at 1259.

[30] *Id.* at 1258-1260. In so doing the court emphasized the broad language the Commission itself employed in the *Specialized Carrier* proceeding. *Id.* at 1262-1263. *See* note 4 *supra*,

so doing the Third Circuit decision provides strong support—not conflicting authority—for the similarly broad construction we accorded in *Execunet* to *Specialized Carrier* and to the Commission's *Bell Telephone* order. For just as the Third Circuit found *Specialized Carrier* sufficiently broad to include FX and CCSA service, notwithstanding the absence of specific references to these services, so too we have found that decision broad enough to encompass Execunet, notwithstanding the similar absence of specific references.[31]

Nonetheless, AT&T and the Commission, pointing to the Third Circuit's discussion of an overbreadth challenge, argue that that discussion forecloses the FCC from finding that AT&T is required to interconnect for Execunet under the *Specialized Carrier* and *Bell Telephone* orders.[32]

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quoting *Specialized Carrier*, 29 FCC2d at 940; *Execunet*, *supra* note 2, 561 F.2d at 378-379.

[31] Indeed, one of AT&T's stronger arguments against the *Bell Telephone* result is directly supportive of the result we reach here. In arguing that FX and CCSA should not be considered within the scope of *Specialized Carrier*, AT&T emphasized that FX and CCSA services were already being provided at the time by AT&T and independent carriers, and that the FCC in *Specialized Carrier* was "contemplating other, more unique services." 561 F.2d at 1262. The Third Circuit did not find this dispositive, concluding that "[w]hile there is language in [*Specialized Carrier*] indicating a concern with new, customized services, we interpret this language as referring not only to types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services fashioned to their particular needs." *Id.* We need only point out that to the extent both AT&T and the Third Circuit recognized in *Specialized Carrier* a concern with and an interest in encouraging "new, customized service," that is a recognition which we share in finding that decision dispositive of MCI's right—in theory and in practice—to provide Execunet.

[32] *See* FCC Declaratory Ruling, *supra* note 1, ¶ 58; Response of Federal Communications Commission, *supra* note 18, at 10-11, 20; AT&T Opposition, *supra* note 17, at 19.

We disagree. In *Bell Telephone* AT&T argued, *inter alia*, that the order under review, by requiring it to provide "the interconnection facilities essential to the rendition of all of [the specialized carriers'] presently or hereafter authorized interstate and foreign communications services," 503 F.2d at 1283, imposed an "*unbounded* interconnection order." *Id.* at 1273 (emphasis in original). The court rejected this challenge and upheld the order, noting:

> Were we to read the Commission's order in a vacuum, we would be inclined to agree with petitioner that the order is somewhat vague and, to a certain extent, overbroad. On its face, the order gives little guidance as to the types of services that A T & T will be required to provide "hereafter."
>
> Nevertheless, we find it unnecessary to remand on this ground. Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear. * * * Viewed in its entirety, the FCC's opinion in Docket 19896 operates to preclude AT&T from treating its Long Lines Department and its affiliates differently than it treats the specialized common carriers. * * * As we read the order, the FCC has required A T & T to provide to the specialized carriers those (interconnection) elements of private line services which A T & T supplies to its affiliates and furnishes to customers through its Long Lines Department. * * *

Id. at 1273-1274.

The question presented by the arguments of the FCC and AT&T here is whether the above paragraphs clearly limit the *Bell Telephone* interconnection order so as to exclude Execunet, which the Commission has determined is not a "private line" service.[33] In concluding that it does not, we think two factors are of importance. First, the overbreadth and vagueness with which the Third Circuit

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[33] FCC Declaratory Ruling, *supra* note 1, ¶ 53, quoting *MCI Telecommunications Corp.*, 60 FCC2d 25, 63 (1976).

was concerned were directed not to any uncertainty as to what services the specialized common carriers themselves would provide, but rather to the fact that "[o]n its face, the order gives little guidance as to *the types of services that AT&T will be required to provide* 'hereafter.'" *Id.* (emphasis added). Such concerns are not involved in this case, however, since Execunet apparently does not call for any novel forms of service from AT&T, but rather requires virtually the same forms of interconnection as are provided for FX.[34] Second, and more important, the Commission itself has not found or suggested that the court's *Bell Telephone* decision in fact limits AT&T's interconnection obligations to "private line" services, as that term is currently defined by the Commission. Rather, the Commission, notwithstanding its emphasis on the Third Circuit's use of the term "private line" as a limiting factor in its decision, itself recognizes that *Bell Telephone* imposes upon AT&T an obligation to provide interconnection for services not traditionally considered "private line"—and that it did so at the time it was entered. To quote the Commission once again: "We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* interstate communication services * * *." FCC Declaratory Ruling, *supra*, at ¶ 59 (emphasis in original). Having made this determination, and having explained the Third Circuit's use of "private line" as a shorthand or abbreviated term, the Commission then formulates the final and dispositive question for resolution as that of "what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff Offerings*, and *Bell Tel. Co. of Pennsylvania*." *Id.* (emphasis in original). And that is precisely the question we addressed

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[34] *See* MCI Reply to Oppositions, *supra* note 19, at 14.

and answered in *Execunet*, finding that Execunet services were *not* explicitly excluded.

The Commission's analysis of *Bell Telephone*, then, far from providing authority which conflicts with our construction of the *Execunet* decision, culminates finally in the very question which was not addressed in *Bell Telephone* but which was answered in *Execunet*. Neither the Commission nor AT&T is now free to choose to ignore the answer given by this court, in lieu of one more favorable to their position we rejected in *Execunet*.

Motion granted.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, DATA TRANSMISSION COMPANY (DATRAN), AND SOUTHERN PACIFIC COMMUNICATIONS COMPANY, INTERVENORS

Petition for Review of Orders of the Federal Communications Commission

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Argued April 28, 1977

Decided July 28, 1977

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Kenneth A. Cox, with whom *Michael H. Bader*, *William J. Byrnes*, and *Raymond C. Fay* were on the brief, for petitioners.

John E. Ingle, Counsel, Federal Communications Commission, with whom *Werner K. Hartenberger*, General Counsel, and *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, and *Carl D. Lawson*, Attorney, Department of Justice, were on the brief, for respondents. *Ashton R. Hardy*, General Counsel for the Federal Communications Commission at the time the record was filed, entered an appearance for respondent Federal Communications Commission. *James F. Ponsoldt*, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Michael Boudin, with whom *Craig D. Miller*, *Alfred C. Partoll*, and *F. Mark Garlinghouse* were on the brief, for intervenor American Telephone and Telegraph Company.

Thomas J. O'Reilly was on the brief for intervenor United States Independent Telephone Association.

John M. Scorce and *Kevin H. Cassidy* were on the brief for intervenor Data Transmission Company.

Herbert E. Forrest entered an appearance for intervenor Southern Pacific Communications Company.

Before WRIGHT, TAMM, and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: This is a petition to review two orders of the Federal Communications Commission, each of which requires petitioner MCI Telecommunications Corporation to cease and desist from offering and operating its "Execunet" telephone service.[1] Finding that

[1] The orders are a letter order of July 2, 1975 (FCC 75-799) and the *Decision* in *MCI Telecommunications Corp.*, 60 FCC2d

the Commission has not taken the steps required by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1970), to restrict the services MCI may offer over its *existing* facilities, we reverse.

I. BACKGROUND

MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. (hereinafter, collectively, MCI) are affiliated communications common carriers which operate a transcontinental point-to-point microwave system catering to business and data communications markets. In the vernacular of the trade MCI is a "specialized common carrier."

The present dispute has its roots in MCI's September 1974 filing of revisions to its tariffs F.C.C. No. 1—the tariff under which MCI furnishes all its interstate services. Those revisions, which became effective October 10, 1974, established rates for a class of "metered use" services, among which was Execunet.[2] With Execunet a subscriber using any push-button telephone (or rotary dial phone and tone generator) can reach any telephone in a distant city served by MCI simply by dialing a local MCI number followed by an access code and the number in the distant city. Execunet customers are billed for each call on a time and distance basis, subject to a monthly minimum.[3]

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25 (July 13, 1976). The letter order is set out at Appendix B of the second order, 60 FCC2d at 62-64.

[2] Apparently the tariffs do not themselves define Execunet service, but define only certain "modular" services and rates therefor. Putting these modular services together in a particular way results in the Execunet service package. The term "metered use" refers to the fact that charges for some services are set on a usage basis.

[3] Execunet's characteristics are summarized as follows.

A customer in the calling city calls the local MCI office via local exchange telephone service from any push-

In the spring of 1975 intervenor AT&T, after subscribing to Execunet and procuring Execunet marketing brochures, complained orally to the Commission that MCI was offering interstate long distance message telephone service (MTS) under the guise of Execunet and that no such service could properly be tariffed by MCI. Apparently AT&T representatives approached individual commissioners and various Commission staff personnel with this complaint and even held a demonstration of Execunet in the Commission's offices. Subsequent to the *ex parte* complaints, AT&T filed with the Commission a letter which repeated the allegations previously made.

The Commission forwarded AT&T's letter to MCI and indicated that MCI's "comments on this matter would be appreciated."[4] MCI wrote a series of letters in return.

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button telephone in the local exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-minute toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand.

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 26 n.1.

[4] Letter from FCC to MCI, May 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64, JA 8.

In the first it took the position that AT&T's complaint was untimely and should be rejected, but that in any case Execunet was a "private line" service which MCI was authorized to offer.[5] By a further letter MCI complained of AT&T's *ex parte* "lobbying" and asked for an opportunity to present its side of the dispute to the Commission.[6] In a third letter MCI pointed out that its licenses were not limited by anything in Section 21.705 of the Commission's rules[7] pursuant to which point-to-point microwave radio licenses are issued to communications common carriers.[8] It also called the Commission's attention to AT&T's comments in Rulemaking Docket 19117,[9] in which AT&T had taken the position that the Commission had no statutory authority to require prior approval of new services that were to be offered over

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[5] Letter from MCI to FCC, June 5, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 65-68, JA 9-15.

[6] Letter from MCI to FCC, June 9, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 69-70, JA 16-18.

[7] § 21.705 Permissible communications.

> Stations in this service are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization or limited by § 21.701 or § 21.703 [the latter rules relating to frequency use]. * * *

47 C.F.R. § 21.705 (1976).

[8] Letter from MCI to FCC, July 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 80-84, JA 39-48.

[9] *In the Matter of Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities, and Amendment of Part 63.60—63.90 of the Rules, Notice of Proposed Rule Making,* 27 FCC2d 36 (1971); *Report and Order,* 39 FCC2d 131 (1973).

existing facilities of a domestic carrier, but instead could regulate such services, if at all, only under the tariff provisions of the Communications Act. In MCI's view, AT&T's position in Docket 19117 [10] denies the authority asserted by the Commission in the instant proceeding on AT&T's behalf. MCI also pointed out that the report in Docket 19117 states that new service offerings could be proposed by merely filing a tariff.[11]

Without holding a hearing or even disclosing the details of AT&T's arguments concerning the unlawfulness of Execunet, the Commission on July 2, 1975 wrote a letter to MCI which stated: "[Y]our tariff F.C.C. No. 1 is hereby rejected insofar as it purports to offer Execunet service, but without prejudice to MCI's offering any other service which you are authorized to provide." [12] The rationale for this order was explained in the body of the letter.

First, the Commission concluded that MCI could offer only "private line" communications services over its existing facilities:

> In the various Commission orders granting the Section 214 applications of the MCI carriers to construct and operate facilities (e.g., 32 F.C.C.2d 36 (1971), FCC 72-456 (May 26, 1972), FCC 72-832 (September 22, 1972), FCC 72-852 (September 29, 1972)), appears language similar to the following:

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[10] *See Letter, supra* note 8, 60 FCC2d at 82-83, JA 44-46.

[11] "[T]he termination of the rule making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions * * *." *Report and Order, supra* note 9, 39 FCC2d at 135.

[12] *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64.

> The service proposed is essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications.

Each grant refers to the paragraph which incorporates the above language as conditioning the grant of construction and operating authority. As a result, MCI is only permitted to operate its facilities for private line services.

Further, in our *Second Report* on domestic satellites, which followed the *Specialized Common Carrier* decision, we pointed out (35 F.C.C.2d 844, 853 (1972)):

> In encouraging multiple entry and the development of competition in the supply of domestic communications, we have maintained a distinction between the so-called monopoly switched telephone services now being furnished by AT&T and all other classes of existing and potential specialized services.

It is thus clear that MCI sought authorization to offer only private line services, and that it was granted authority to offer only such services.[13]

The Commission then rejected MCI's arguments that Execunet was a private line service like AT&T's "foreign exchange" (FX) service, deciding instead that "the combination of * * * similarities" between Execunet and AT&T's MTS made Execunet "essentially a switched public message telephone service * * *." [14]

MCI immediately filed a petition for review in this court and sought a stay of the Commission's order, arguing that the Commission had failed to comply with

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[13] *Id.* at 63.

[14] *Id.*

Section 4 of the Administrative Procedure Act,[15] its own rules governing informal complaints,[16] its own rules governing *ex parte* contacts,[17] Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204-205 (1970), and the Due Process clause. The request for a stay was granted.[18] Subsequently the Commission, which had previously refused to allow MCI any kind of hearing, moved to have the proceedings remanded so that it could consider matters more fully than it had previously. This motion was granted, although jurisdiction was retained.

In December 1975 the Commission issued an order commencing the proceedings on remand. *MCI Telecommunications Corp.*, 57 FCC2d 271 (1975), SA 49.[19] It announced that comments and reply comments would be accepted and that oral argument or an evidentiary hearing might be held if warranted by the written submissions. The issue to be resolved was said to be "whether or not Execunet is a service which MCI is authorized to offer pursuant to its facility authorizations and policies set forth by this Commission." [20] On March 26, 1976 the Commission announced that it would hold oral argument and designated the issues to be addressed at that time. The issues the Commission identified as having been

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[15] 5 U.S.C. § 553 (1970).

[16] 47 C.F.R. §§ 1.711-1.735 (1976).

[17] 47 C.F.R. §§ 1.1201-1.1251 (1976). *See also Rules Governing Ex Parte Communications*, 1 FCC2d 49 (1965).

[18] This court initially stayed the Commission's order in its entirety. After the proceedings on remand our order was modified to allow MCI to continue to serve its present customers, but solicitation of new customers was not permitted.

[19] "SA" refers to a two-volume Supplemental Appendix covering the proceedings on remand.

[20] *MCI Telecommunications Corp.*, 57 FCC2d 271, 271-272 (1975), SA 49-50.

raised by the comments and reply comments were the following:

a. What class or classes of service is MCI permitted to offer pursuant to its facility authorizations and Commission policies?

b. What changes, if any, were made to the permitted classes of service by our Report and Order in Docket 19117, 39 FCC2d 131 (1973)?

c. Is Execunet service, as presently offered, a private line service?

d. Were any communications between parties to this proceeding and the Commission, as developed by filings herein, in violation of any applicable statute or regulation?

e. If any prohibited contacts occurred, what effect have they had on the substance of this proceeding?

f. Whether any further proceedings are required to comport with the requirements of due process of law.

MCI Telecommunications Corp., 58 FCC2d 962, 963 (1976), SA 812.

Prior to oral argument the Commission issued yet a third order responding to procedural motions made by MCI at various points during the comment period. *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-441, May 17, 1976), SA 892. In this order the Commission rephrased the primary issue before it as "whether MCI's facility authorizations and Commission policies restrict in any way the broad categories of service which MCI may offer." [21] It also stated that the proceedings would not be expanded to include consideration

[21] *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-442, May 17, 1976), SA 894.

of "whether it is in the public interest for MCI to offer Execunet regardless of whether it is within the class of services it may offer." [22] Finally, the Commission for the first time mentioned the statutory authority for its actions: "th[is] proceeding is an investigation into the lawfulness of MCI's Execunet service offering, conducted pursuant to Sections 4(i), 4(j), 201, 204, 205, 208 and 403 of the Communications Act of 1934, as amended, 47 USC 154(i), 154(j), 201, 204, 205, 208 and 403." [23]

After oral argument the Commission issued an extensive opinion, again finding that MCI was not authorized to offer Execunet. *MCI Telecommunications Corp.*, 60 FCC2d 25 (1976). The approach taken in that opinion is materially different from that taken in the July 1975 letter order, however. Whereas the letter order had relied on express restrictions written into MCI's facilities authorizations (the certificates of public convenience and necessity issued pursuant to Section 214(a) of the Communications Act, 47 U.S.C. § 214(a) (1970)),[24] the opinion on remand stated:

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[22] *Id.*, SA 895.

[23] *Id.*

[24] (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *. * * * No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby * * *. As used in this section the term

> As MCI points out, however, not all of its authorizations contain similar language [*i.e.*, restrictions], some contain no such restrictions, and thus it is necessary to look further, to our expressed policies and to judicial statements, to ascertain the limits on [specialized common carrier] services.[25]

The Commission's "further look" began with a review of the seminal *Specialized Common Carrier* decision,[26] pursuant to which most specialized carrier facilities authorizations have been issued. The purpose of that decision was to facilitate the Commission's handling of Section 214 applications by determining by rulemaking "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field * * *."[27] While the Commission apparently concedes that it did not define

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> "line" means of channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

[25] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 35.

[26] *Specialized Common Carrier Services,* 29 FCC2d 870 (1971), *aff'd, sub nom. Washington Utilities & Transportation Comm'n v. FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975). *See also Bell Telephone Co. v. FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975); *AT&T v. FCC* [*United States Transmissions Systems, Inc.*], 539 F.2d 767 (D.C. Cir. 1976).

[27] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 878.

the boundaries of the "specialized communications field," [28] it asserts that the services to be offered over the facilities covered in some 1,700 Section 214 applications before it provided a touchstone for its analysis and that all such services were "private line." Accordingly, it is the Commission's position that it did not consider services other than private line services in determining the public interest ramifications of competition.[29] As an example

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[28] *See* note 68 *infra.*

[29] 35. At the time of the *Specialized Common Carrier* decision, we had before us 1712 microwave applications from 33 applicants, 17 of which were affiliated with MCI. Accordingly, the statements of MCI as to the types of services it proposed to offer were of importance in the policy determination made therein and are helpful in ascertaining the limits, if any, imposed upon Specialized Common Carrier (SCC) service offerings. The MCI applications considered were for "portions of a proposed nationwide network to provide specialized *private line* communications services" (emphasis added) 29 FCC2d at 874. We further quoted MCI's pleadings that "the real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability" 29 FCC2d at 875. Finally MCI asserted that there was a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private line basis, *Id.* [*sic*] Thus, MCI sought therein to offer only private line, point-to-point services. * * *

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 36. *See also* FCC Letter Order, *id.*, Appendix B, 60 FCC2d at 62:

> *Specialized Common Carrier Services,* 29 F.C.C. 2d 870 (1971), which established the Commission's policies regarding entry of the specialized common carriers in competition with AT&T, contemplated such entry only in the private line field, not in the area of switched public message telecommunications service. * * *

of this the Commission points to its analysis of "cream-skimming," the argument that specialized carriers will upset the established rates of general carriers (such as AT&T) by siphoning off high-profit business.[30] The Commission's interpretation here of its discussion of cream-skimming in *Specialized Carriers* is that it found allegations of cream-skimming to be unfounded only because the specialized carriers were not proposing to compete "to any substantial degree" with AT&T's monopoly service offerings, MTS and WATS.[31]

Having concluded that the *Specialized Common Carrier* decision makes no reference to competition in other than private line areas, the Commission turned next to MCI's allegations concerning the meaning of the Commission's Rule 21.705, 47 C.F.R. § 21.705 (1976), and its orders in Docket 19117.

Rule 21.705 governs the scope of licenses granted carriers in the point-to-point microwave service. Its operative language is that a carrier may offer any service "provided for in the *legally applicable tariffs* of the carrier, unless otherwise directed in the applicable instrument of authorization * * *" (emphasis added). MCI, focusing on the second phase, had argued that the absence of any directions in its instruments of authorization indicated that it was free to offer by tariff *any* communications service that could physically be provided on its existing system. The Commission, on the other hand, took the position that the italicized language is the key and that tariffs exceeding the bounds of the *Specialized Carrier* decision can never become "legally appli-

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[30] *See Specialized Common Carrier Services*, *supra* note 26, 29 FCC2d at 910 (¶ 78).

[31] *MCI Telecommunications Corp.*, *supra* note 1, 60 FCC2d at 36, quoting *Specialized Common Carrier Services*, *supra* note 26, 29 FCC2d at 915.

cable." Thus in the Commission's view Rule 21.705 merely "expresses the truism that a carrier need not generally file an application [under Section 214] for each new service it wishes to offer, [and therefore] it cannot be used to reverse a clearly defined Commission policy." [32]

The Commission takes a similarly narrow view of the effect of its *Report and Order* in Docket 19117. That docket was started to consider whether domestic carriers should be required to get Commission approval before filing tariffs proposing services not previously provided or set out in a Section 214 application.[33] The purpose of the proposed rules was threefold: to decide the public interest ramifications of a service before it was commenced, thereby protecting the public from service disruptions that might be caused if the service were allowed to go into effect and later enjoined; to put general domestic carriers (such as AT&T and Western Union), which could theretofore start a new service simply by filing a tariff, on an equal footing with international and domestic miscellaneous carriers whose facilities authorizations were always restricted so that new services required further Section 214(a) proceedings; and to protect entrants to the specialized carrier field who also needed prior approval of entry under Section 214(a) from unfair competition from the generalized carriers.[34] The proposed rules were never adopted, and restrictions in facilities authorizations which had worked a result similar to the proposed rules were expressly declared "null and void" in the order terminating the docket.[35]

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[32] *Id.* at 38.

[33] *See Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38-39.

[34] *Id.* at 39.

[35] *See Report and Order, supra* note 9, 39 FCC2d at 137.

MCI argued before the Commission that the result of Docket 19117 was that any express restrictions in its facilities authorizations were lifted and that it should be free as a result of the order terminating the docket to propose new services simply by filing a tariff, even if it was not free before. The Commission's response was that Docket 19117 was not concerned with competition except in the specialized carrier field—the only field in which competition was allowed at the time of the *Report and Order* in that docket.[36] Thus the Commission's view apparently is that existing specialized carriers are allowed to offer private line services free of any prior approval requirement as a result of Docket 19117, but are required to proceed by Section 214 application with respect to all other services.

In the remainder of the opinion below the Commission again concluded that Execunet was not a private line service.[37] It also concluded that no facts were in dispute which required an evidentiary hearing and denied MCIs motion for one.[38] The Commission for a second time refused to consider whether Execunet should be permitted regardless of the scope of the *Specialized Common Carrier* decision, and further indicated that it had intended to confer on AT&T a monoply over MTS and WATS by its ruling in *Specialized Carriers*, a decision that could not be changed absent a demonstration of changed circumstances.[39] Finally, the Commission re-

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[36] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 39.

[37] *See id.* at 40-44.

[38] *Id.* at 44-48.

[39] [W]e disagree with MCI that we have never defined the areas of telecommunications service which should be open to competition and those which are a monopoly. Rather,

fused to inquire further into the *ex parte* contact problem on the ground that all such contacts had occurred before commencement of formal proceedings and were, therefore, proper under both court and Commission rulings.[40]

On this petition for review MCI has challenged virtually every ruling of the Commission in the proceeding on remand and has renewed its attack on the July 1975 letter order.

II. Analysis

A.

The implicit restrictions argument advanced by the Commission in its opinion on remand represents a substantial departure from prior administrative practice. As the Commission's letter order suggests, the usual way in which a carrier becomes restricted in the services it may offer is for the Commission to write restrictions into the facilities authorizations that must be obtained pursuant to Section 214 of the Communications Act before any communications line may be built, operated, or extended.[41] Accordingly, a carrier can usually tell if it is subject to service restrictions simply by examining

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that was the principal purpose of our investigation in [*Specialized Carrier Services, supra* note 26]. * * *

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109. In essence MCI is * * * asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to competition. We decline to do so. * * * There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* [was] based have changed at all * * *.

MCI Transcommunications Corp., supra note 1, 60 FCC2d at 56-57.

[40] *Id.* at 48-54.

[41] *See* text at note 13 *supra*; note 24 *supra*.

the instruments of authorization issued to it by the Commission. Section 21.705 of the Commission's rules, 47 C.F.R. § 21.705 (1976), which governs the manner in which point-to-point microwave radio licenses can be used by specialized carriers such as MCI, similarly recognizes that the usual place to find restrictions on services is in the "applicable instrument of authorization." *See also* 47 U.S.C. § 309(h)(1) (1970) (which indicates that restrictions will usually be found in the license instrument); 47 C.F.R. § 21.903(b) (1976) (instrument of authorization controls in part services that may be offered on a multi-point distribution system).

The Commission's discussion of its administrative practice in Docket 19117 is also instructive. There the Commission explained that in the absence of restrictions imposed under Section 214 in the facilities authorizations, carriers could offer any service which could physically be provided over their existing systems simply by filing a tariff.[42] This discussion clearly indicates that the Commission's understanding of Section 214 of the Act has until now been that explicit action is necessary to restrict a carrier to the service offerings it proposed when it sought authority to build, operate, or extend its communications lines.

Finally, as evidenced by the decision in *Press Wireless, Inc.*, 25 FCC 1466 (1958), *aff'd, sub nom. Press Wireless, Inc. v. FCC*, 264 F.2d 372 (D.C. Cir. 1959) (*per curiam*), the Commission has from time to time exercised its express authority under Section 303(b) of the Act, 47 U.S.C. § 303(b) (1970), to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" by promulgating rules setting out limitations on services to

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[42] *See Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38; *Report and Order, supra* note 9, 39 FCC2d at 133.

be offered over radio facilities. *See, e.g.*, 47 C.F.R. §§ 21.509, 21.606, 21.903 (1976). In this regard it is instructive to note that the Commission has *not* enacted any comparable service restrictions for point-to-point microwave licensees and in particular it has *not* made the definition of "private line service" set out in 47 C.F.R. § 21.2 (1976) applicable to such licenses, although this would certainly seem to be the natural thing to have done had the Commission sought to restrict specialized carriers to private line service offerings.

The fact that an administrative practice is novel does not, of course, mean that it is wrong. However, novelty is a warning signal that all may not be well, especially in the instant case in which the Commission has itself failed to discuss the statutory warrant for the new course it has adopted. When the Communications Act is considered in detail, it becomes apparent that novelty has led to error in this case.

B.

To frame our analysis, we sketch at the outset some principles which are either uncontested or uncontestable. First, it is settled that "a tariff [may] be rejected if it is unlawful without prior agency approval and approval has not been obtained." *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971); *accord, Press Wireless, Inc. v. FCC*, *supra*.[43] Yet the power to require

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[43] *See also North Central Truck Lines, Inc. v. ICC*, —— F.2d ——, —— (D.C. Cir. No. 76-1597, decided June 6, 1977) (slip op. at 4); *Delta Airlines, Inc. v. CAB*, 543 F.2d 247, 254 (D.C. Cir. 1976); *Municipal Light Boards of Reading & Wakefield, Mass. v. FPC*, 450 F.2d 1341, 1345-1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

MCI has vigorously argued that rejection of a tariff is not possible once a tariff has become effective. We need not decide whether this is so since, as this case comes to us after remand, no facts material to the issues thus far decided by the Commission are in dispute and, accordingly, the Commis-

prior agency approval is itself circumscribed, for it is well recognized that the tariff provisions of the Communications Act (Sections 203-205, 47 U.S.C. §§ 203-205),[44] like the cognate sections of the Interstate Commerce Act (49 U.S.C. §§ 15(1), 15(7) (1970)),[45] embody

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sion could, as it apparently did, issue a cease and desist order pursuant to 47 U.S.C. § 205 (1970) without more of a hearing than has already been afforded MCI. Thus, even if the Commission was without power to reject a tariff as that phrase is used as a term of art, it was empowered to reject the Execunet tariff in a practical sense.

[44] Under the Communications Act the practices of *existing* carriers using *existing* facilities are regulated primarily through the tariff mechanism established in §§ 203-205 of the Act, 47 U.S.C. §§ 203-205 (1970). Section 203 obliges carriers to file tariff schedules with the Commission and to make such schedules available to the public. Section 203(b) expressly recognizes that changes in the services a carrier may offer will be commenced with a tariff filing. Operation except in strict compliance with applicable tariffs is prohibited, 47 U.S.C. § 203(c), as are discriminations and preferences, *id.* § 202. Prior to the effective date of a tariff—a date certain that must be set out in the tariff, *id.* § 203(d)—the Commission may suspend the tariff and hold a hearing concerning the lawfulness thereof. *Id.* § 204. If the hearing has not been completed within three months (five months as of 1976, *see* 47 U.S.C.A. § 204 (1977 pocket part)) after the effective date of the suspended tariff, that tariff by law goes into effect. *Id.* After the effective date, and without regard to whether a tariff has previously been suspended, the Commission may hold a hearing on the lawfulness of the tariff, although the tariff must be allowed to remain in effect pending the outcome of such a hearing. *Id.* § 205; *see AT&T v. FCC*, 487 F.2d 865, 874-875 (2d Cir. 1973). Subsequent to a hearing under either § 204 or § 205 the Commission may prescribe such rates, classifications, regulations, or practices as shall be determined to be just, fair, and reasonable, and it may enjoin the carrier from continuing services except as prescribed. 47 U.S.C. §§ 204, 205.

[45] "Section 204 * * * is adapted from section 15(7) of the Interstate Commerce Act so as to apply to communications. * * * Section 205 follows sections 15(1) and 16(8) of the

a considered legislative judgment that carriers should in general be free to initiate and *implement* new rates or services over existing communications lines unless and until the Commission, after hearing, determines that such rates or practices are unlawful, subject only to a limited period of suspension set out in the statute. *AT&T v. FCC*, 487 F.2d 865, 870-881 (2d Cir. 1973); *see United States v. SCRAP*, 412 U.S. 669, 697 (1973) (interpreting Interstate Commerce Act); *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 662-669 (1963) (same).[46] As the Second Circuit explained in the *AT&T* case in overturning a Commission requirement that AT&T obtain approval prior to filing tariff revisions:

Interstate Commerce Act * * *." S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934). *See also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 5-6 (1934).

[46] Since the most likely objection to MCI's provision of Execunet service is its potential effect on AT&T's MTS, it is useful to note that the Supreme Court, in *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 669 (1963), rejected the claim that a court should have the power to extend the statutory suspension period to protect competitors of a carrier and their customers:

> It must be admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers and their customers such as are involved in this case. We see no warrant in that omission, however, for a difference in result. * * *

In noting that neither claims of a carrier's customers nor those of its competitors or competitors' customers in any way abridge the right of a carrier to implement a new rate or service, we do not intend to suggest that a showing of harm to competitors or competitors' customers would be insufficient to sustain a service restriction promulgated in accord with 47 U.S.C. § 214(c) (1970) or 47 U.S.C. § 303(b) (1970). Our only point is that allegations of harm to competitors or competitors' customers do not in any way expand the Commission's suspension or rejection powers.

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.[47]

The Second Circuit, moreover, rejected the Commission's argument that the general grants of procedural authority in Sections 4(i), 4(j), and 403 of the Act, 47 U.S.C. §§ 154(i), 154(j), 403 (1970), empowered the Commission to erect prior approval requirements like that imposed on AT&T, although it recognized that the Commission would have the power to reject a tariff whenever a section of the Act expressly establishes or authorizes[48] a prior approval requirement.[49]

Applying these principles to the instant case, the issues to be resolved are two: whether and to what extent Section 214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly exercised whatever authority it may have under Section 214.

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[47] *AT&T v. FCC, supra* note 44, 487 F.2d at 880 (footnote omitted).

[48] Of course, if the statute merely authorizes the Commission to impose a prior approval requirement, as is the case with § 303(b), 47 U.S.C. § 303(b) (1970), that authority would have to be exercised before rejection is proper.

[49] *AT&T v. FCC, supra* note 44, 487 F.2d at 876-881 & 880 n.13, citing *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

Section 214 establishes the Commission's regulatory charter over entry into the common carrier communications field and states that no carrier shall construct, extend, or acquire a line unless the Commission has first affirmatively determined that such entry would be in the public interest.[50] The primary purpose of Section 214 (a) is prevention of unnecessary duplication of *facilities*, not regulation of services.[51] Because of this, Section 214 would appear to have a limited office with respect to regulation of service offerings on existing lines. We have held as much,[52] and this view is confirmed by the final proviso to Section 214(a) which states expressly that

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[50] *See* note 24 *supra*.

[51] *See* 78 CONG. REC. 10314 (1934) ("The section [§ 214] is designed to prevent useless duplication of facilities, with consequent higher charges upon the users of services."). It is also clear that § 214 was intended to apply only to construction or acquisition of new lines. *See id.;* H.R. Rep. No. 1850, *supra* note 45, at 6; S. Rep. No. 781, *supra* note 45, at 5; *accord, Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 355 (3d Cir. 1976); *United Telegraph Workers v. FCC*, 436 F.2d 920 (D.C. Cir. 1970).

Of course, § 214 also applies to abandonment of service, *see* note 24 *supra*, but no one has so far contended that Execunet will have any impact, adverse or otherwise, on provision of pre-existing MCI services.

[52] In the first Western Union Mailgram case, *United Telegraph Workers v. FCC, supra* note 51, the Telegraph Workers sought to force the FCC to enjoin Mailgram service pending a hearing at which § 214 issues could be ventilated. The Commission, on the other hand, maintained that the Mailgram tariff should be processed in the same manner as any other tariff filing. This court sided with the Commission on the ground that (with exceptions not relevant here) § 214 did not apply to even this novel use of existing facilities. *See* 436 F.2d at 924-925.

> nothing in this section [214] shall be construed to require a certificate or other authorization from the Commission for any * * * changes in plant, *operation*, or equipment, *other than new construction*, which will not impair the adequacy or quality of service provided.[53]

Moreover, we do not agree with the suggestion of Commission counsel in brief[54] that Judge Wilkey's opinion in *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974), somehow transmogrifies Section 214(a) so that carriers must now obtain Commission approval before they implement new services.[55] In *Hawaiian Telephone* this court reversed a grant of Section 214 authority to RCA Global Communications, Inc. on the ground that the Commission was allowing competition merely for competition's sake in direct violation of the teaching of the Supreme Court in *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). In stating the proper standard to be applied under Section 214(a) Judge Wilkey wrote: "When the FCC considers an application

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[53] 47 U.S.C. § 214(a) (1970) (emphasis added); *see* note 24 *supra*.

[54] FCC brief at 24 & n.14, 32 n.23.

[55] If this were the case, then there would obviously have been no need for the rulemaking in Docket 19117 which proposed rules that would have required "common carriers [to] request prior Commission approval before offering or discontinuing any new or revised classification of communications, irrespective of whether offered over proposed new facilities or over facilities previously authorized by the Vommission [*sic*]." *Notice of Proposed Rule Making*, *supra* note 9, 27 FCC2d at 38-39. Similarly, if the Commission is now correct, then both the Commission and this court were in error in *United Telegraph Workers v. FCC*, *supra* note 51. *See* note 52 *supra*. *See also MCI Telecommunications Corp.*, *supra* note 1, 60 FCC2d at 38 ("a carrier need not generally file an application [under § 214] for each new service it wishes to implement").

for certification of a new line, it must start from the situation as it then exists, and must * * * determine whether indeed the public convenience and necessity requires more or better *service*." 498 F.2d at 776 (emphasis added). We do not read this statement to suggest that every time a carrier seeks to start a new service over existing facilities it must petition the Commission under Section 214(a), but rather it is merely a matter of fact observation that it is analytically impossible to determine the need for a new facility without considering the services to be provided over it. In addition, the reading suggested by the Commission would nullify the final proviso of Section 214(a) by requiring a "certificate [and] other authorization from the Commission" prior to changes in carriers' operations even if such changes did not affect the "adequacy or quality" of the carriers' preexisting services. There is no indication that the *Hawaiian Telephone* court contemplated such a remarkable result. Nor, indeed, can such a result be justified by reference to the primary purpose of Section 214 because, so long as the "adequacy or quality" of the service proposed in a Section 214(a) application is not impaired by provision of other services, the public need that justified construction of facilities will still be met and there is no sense in which those facilities would have become needlessly duplicative.

Notwithstanding the proviso to Section 214(a), Section 214(c) gives the Commission authority to [56]

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[56] Section 214(c) provides:

> The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as

> issue such certificate [facility authorization] as applied for * * * or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions *as in its judgment the public convenience and necessity may require.* * * *

(Emphasis added.) Used to condition the services an individual carrier may offer, Section 214(c) would provide a power over individual carriers in all respects identical to its power over classes of carriers under Section 303(b), which was held in *Press Wireless, Inc. v. FCC, supra,* to give the Commission authority to create a prior approval requirement. For this reason Section 214(c) does, in our judgment, authorize the Commission to restrict the services that may be offered over a communication line once it is built, acquired, or extended. *Cf. Western Union Telegraph Co. v. FCC,* 541 F.2d 346, 355 (3d Cir. 1976). However, since any prior approval requirement is in derogation of the legislative compromise embodied in Sections 203-205, the Commission must strictly follow the terms of Section 214(c) and it

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> in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest

47 U.S.C. § 214(c) (1970).

cannot impose any such restriction unless it has affirmatively determined that "the public convenience and necessity [so] require."

C.

With the framework of our inquiry in mind, we turn next to the question whether the Commission was correct in concluding that the *Specialized Common Carrier* decision was a lawful exercise of Section 214(c) authority. As we understand the Commission's opinion on remand, there are two considerations supporting its view that the *Specialized Common Carrier* decision restricted the services specialized carriers can offer—first, the fact that only private line services were before the Commission in Section 214 applications [57] and, second, that the Commission's analysis of cream-skimming assumed that specialized carriers would be restricted to private line services.[58] We consider these in turn.[59]

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[57] *See* note 29 *supra.*

[58] [O]ur analysis of possible revenue diversion (29 FCC2d at 911-914) dealt only with the private line revenues of these two carriers. Further, we recognized that SCCs would not compete directly with the established carriers' message services.

> "There is no reason to believe that [nationwide average] pricing of the interstate message service offerings of the Bell System and Western Union (such as MTT, WATS, and public telegraph) need be altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear in jeopardy *since those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants.*" 29 FCC2d at 915 (emphasis added) [.]

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 36.

[59] The Commission offered two other considerations in support of its interpretation of *Specialized Common Carrier Serv-*

We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision. Nonetheless, it is readily apparent that failure to consider the public interest ramifications of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative de-

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ices, supra note 26. First, it concluded that specialized carriers would not duplicate services already being offered, whereas in the Commission's view Execunet would duplicate MTS. We fail to see the relevance of this assertion in light of *AT&T v. FCC, supra* note 26.

The Commission also pointed to statements made by the Ninth and Third Circuits in, respectively, *Washington Utilities & Transportation Comm'n v. FCC, supra* note 26, and *Bell Telephone Co. v. FCC, supra* note 26. In *Washington Utilities,* however, the scope of the services authorized in *Specialized Carriers* was not at issue; the reference is simply a general description of the services proposed in the applications before the Commission. The *Bell Telephone* case involved a very different issue, namely, whether the Commission had affirmatively determined that it would be in the public interest to require AT&T to interconnect with MCI for the purpose of allowing MCI to offer FX and CCSA service. *See* 47 U.S.C. § 201(a) (1970). The Commission's view was that *Specialized Carriers* had settled the point, whereas AT&T argued that, since MCI had never mentioned FX and CCSA services in its § 214(a) applications, MCI's provision of those services had not been approved even if some other carriers' might have been. The Third Circuit held that the Commission in *Specialized Carriers* had made an affirmative determination that interconnection for provision of private line services was a general matter in the public interest and that MCI was covered by this general determination. *Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services. However, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c) as we explain in text.

termination that the "public convenience and necessity may require" [60] a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application.

The Commission's analysis of cream-skimming in the *Specialized Common Carrier* decision similarly gives no evidence that the Commission made an affirmative finding that revenue diversion would be a problem if specialized carriers were allowed to compete on the fringes of the message telephone service market as MCI allegedly proposes to do. No such issue was before the Commission in that proceeding. As it has repeatedly asserted here, all it had to consider was whether the competition proposed in the Section 214 applications before it raised serious revenue diversion problems threatening the public interest. This is all it apparently did decide:

> [W]e do not see how there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services.[61]

Moreover, the Commission's staff report, which formed the basis for the *Specialized Carrier* decision, ruminated more broadly on the issues posed by revenue diversion and it appeared highly skeptical of the validity of AT&T's overall argument.[62] Thus there is simply nothing in

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[60] 47 U.S.C. § 214(c) (1970).

[61] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 910.

[62] *See id.* at 883-884.

Specialized Carriers that would support a conclusion that revenue diversion required restrictions on MCI's facility authorizations.[63]

Finally, it should also be noted that the Commission staff, in its report adopted by the Commission,[64] dealt explicitly with the question of how the Commission ought to deal with possible adverse impacts of service offerings other than those which were before the Commission in the *Specialized Common Carrier* decision:

> In the event that adverse consequences to the public should develop, the Commission can take such action *on the relevant tariff filings* as may be necessary to protect the public. We think that in the context of the matters now before the Commission involving proposed new and different services, *a question of this nature is more appropriately considered in connection with the tariffs rather than upon authorization of the facilities.*[65]

And, again, the staff wrote:

> The results of any authorizations would be the object of close and continuous scrutiny by the Commission. Should adverse consequences develop or appear immi-

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[63] It should also be noted that subsequent to *Specialized Carriers* the Commission has indicated a willingness to consider competition in the message telephone field on its merits. *See Domestic Communications-Satellite Facilities*, 35 FCC2d 844, 853-854 (1972). To a large extent this undercuts the Commission's argument here, *see* note 39 *supra*, that it conferred a statutory monopoly on AT&T in this field.

[64] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 920 (¶ 103) ("In light of all of the foregoing and the record as a whole, we adopt our staff's analysis * * * as amplified and modified herein."). There is no indication that the Commission "modified" the staff's analysis of the points relevant to this appeal.

[65] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 886 (emphasis added).

> nent, the Commission can take such remedial action or precautionary measures as may be necessary to protect the public. *As indicated, appropriate action can be taken in connection with the tariffs.* In addition, any renewal of license for the proposed facilities would require a public interest finding and could be subject to any needed conditions. Moreover, the Commission's broad rule making powers are always available. * * *[66]

The undeniable import of the staff's analysis is that questions related to the future impact of specialized carrier service offerings other than those immediately at hand in the *Specialized Common Carrier* case should be resolved in other proceedings—in tariff proceedings, upon license renewal, or by further rulemaking. Strikingly absent from this list is a mention of further Section 214 proceedings.

For the reasons stated above the Commission's *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required "private line" restrictions on the facilities authorizations of specialized common carriers.[67] Instead, it appears that the Commission saw benefits accruing to the public from the services which were before it. In granting the facilities authorizations on the basis of that public interest finding, the Commission did not perhaps intend to open the field of common carrier communications generally, but its constant stress on the fact that specialized carriers would provide new, innovative, and hitherto unheard-of communications services clearly indicates that it had no very

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[66] *Id.* at 887 (emphasis added).

[67] For this reason the deference normally owed to our agency's interpretation of its own decisions, *see, e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965), is not appropriate here. *See id.* at 18.

clear idea of precisely how far or to what services the field should be opened.[68] As indicated in the staff report, a decision was apparently made to consider the consequences of future developments in appropriate future proceedings. There being no affirmative determination of public interest need for restrictions, MCI's facility authorizations are not restricted and therefore its tariff applications could not properly be rejected.

D.

As a final and somewhat collateral point, we are concerned with a thread running through the Commission's analysis—that the *Specialized Carrier* decision granted AT&T a *de jure* monopoly over MTS and WATS service which would be undermined were MCI allowed to provide Execunet—because any such assertion is plainly incorrect and may have influenced the Commission's disposition of the instant case.

As the Commission staff explained in *Specialized Carriers*, absence of competition in the "general domestic common carrier service field * * * is due primarily to the fact that until the filing of [MCI's first Section 214 applications] the Commission had no occasion to consider applications for competitive service in this area." [69] The question whether AT&T should be granted a *de jure* monopoly was not among those proposed to be decided in *Specialized Carriers*, and nowhere in that decision can

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[68] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 905-914 (¶¶ 65-86). Indeed, to the extent that any definition of a specialized common carrier emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public. *See id.* at 882 (¶ 29); *id.* at 906-907 (¶¶ 69-70).

[69] *Id.* at 881.

justification be found for continuing or propagating a monopoly that, according to the staff, had theretofore just grown like Topsy. Of course, there may be very good reasons for according AT&T *de jure* freedom from competition in certain fields; however, one such reason is not simply that AT&T got there first. Indeed, the Commission's attempt here to imbue AT&T's existence with public interest significance represents a retrenchment from the position it took in passing on a proposal to enter the MTS field via domestic communications satellites: "[W]e should not reject any proposal that might prove feasible and beneficial to the public simply because it represents some departure from the established scheme." *Domestic Communications-Satellite Facilities*, 35 FCC2d 844, 854 (1972).

Because the Commission has not so far determined that the public interest would be served by creating an AT&T monopoly in the interstate MTS field, it may not properly draw any inferences about the public interest from the bare fact that another carrier's proposed services would compete in that field.

III. Conclusion

We have today decided that the Commission erred in rejecting MCI's Execunet tariff as unauthorized. The Commission has no general authority to insist that carriers receive its approval before filing tariffs proposing new services or rates. Only if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized. In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. In that eventuality the Commission must be ever mindful

that, just as it is not free to create competition for competition's sake,[70] it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly.[71]

Reversed and remanded.

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[70] *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776-777 (D.C. Cir. 1974).

[71] *Cf., e.g., Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958).

APPENDIX C

Before the Federal Communications Commission, Washington, D.C. 20554

(FCC 78–142—97470)

IN THE MATTER OF PETITION OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY FOR A DECLARATORY RULING AND EXPEDITED RELIEF

MEMORANDUM, OPINION AND ORDER

Adopted: February 23, 1978.

Released: February 28, 1978.

By the Commission: Chairman Ferris issuing a separate statement; Commissioner Fogarty dissenting and issuing a statement.

1. We have before us a "Petition for a Declaratory Ruling and Expedited Relief" filed on January 16, 1978 by the American Telephone and Telegraph Company (AT&T).[1] That petition stated that AT&T will not provide any additional connections to local exchange services to "Other Common Carriers" for

[1] That petition has been styled as "In the Matters of BELL SYSTEM TARIFF OFFERINGS of Local Distribution Facilities for Use by Other Common Carriers; and Letter of Chief, Common Carrier Bureau, dated October 19, 1973, to Laurence E. Harris, Vice President MCI Telecommunications Corporation, FCC Docket No. 19896." Inasmuch as Docket 19896 has been terminated for more than two years, the petition should have been styled as a new proceeding. The petition and all comments or other pleadings relating to this petition will be filed in the instant proceedings, which shall be considered as separate and distinct from the terminated Docket 19896 proceeding.

their use in the provision of service offerings which are not private line services and that AT&T believes such a course of conduct does not violate the cease and desist order in *Bell System Tariff Offerings,* 46 FCC 2d 413 (1974), affirmed *sub nom. Bell Tel. Co. of Pennsylvania* v. *FCC,* 503 F. 2d 1250 (3rd Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975). The petition requested that we issue a declaratory ruling affirming that AT&T has "no present obligation to provide additional connections to local exchange service to Other Common Carriers ("OCCs") for their use in the provision of service offerings which are not private line services."[2]

2. Oppositions to AT&T's request for such a declaratory ruling have been filed by MCI Telecommunications Corporation (MCI), Southern Pacific Communi-

[2] The petition does not define "Other Common Carriers." However, inasmuch as the *Bell System Tariff Offerings* cease and desist order was issued for the purpose of clarifying and enforcing AT&T's obligation to interconnect with specialized common carriers pursuant to our decision in *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), *affirmed sub nom. Washington Utilities & Transportation Commission* v. *FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), the term "Other Common Carriers" in the AT&T petition appears to be synonymous with the term "specialized common carriers" in the *Bell System Tariff Offerings* order which directed AT&T to furnish certain interconnection facilities to "specialized common carriers." AT&T's Reply Comments confirm that the petition does not relate to international record carriers or value-added carriers who are authorized to provide only non-voice services. Neither the petition nor the reply comments indicate that AT&T contemplates any change in interconnection arrangements with Western Union or the independent telephone companies. Accordingly, the discussion and decision herein relates only to interconnection arrangements between telephone companies and specialized common carriers and not to such arrangements between and among telephone companies, or between telephone companies and Western Union, international record carriers, or value-added carriers.

cations Company (SPC), Satellite Business Systems (SBS), American Satellite Corporation (ASC), Telenet Communications Corporation (Telenet), Aeronautical Radio, Inc. (ARINC) and the United States Department of Justice. Comments in support of AT&T's position have been filed by Continental Telephone Corporation (Continental), GTE Service Corporation (GTE), and the United States Independent Telephone Association (USITA). In addition, the following parties have filed comments regarding AT&T's petition as it relates to their individual circumstances, but have taken no formal position before the Commission; Association of Data Processing Service Organizations, Inc. (ADAPSO), Graphnet Systems Inc. (Graphnet), Computer and Business Equipment Manufacturers Association (CBEMA), Western Union International, Inc. (WUI), ITT World Communications, Inc. (ITT Worldcom), and RCA Global Communications, Inc. (RCA Globcom). Additional reply comments have been filed by AT&T, MCI, USITA. GTE and Continental.

I. CONTENTIONS OF THE PARTIES

A. CONTENTIONS OF AT&T

3. AT&T begins by stating that its interpretation of the recent Court of Appeals decision in *MCI Telecommunications Corp.* v. *FCC* (*"Execunet"*), 561 F. 2d 365 (D.C. Cir. 1977), *cert. denied,* No. 77–420, 46 U.S.L.W. 3448 (January 16, 1978), is that the Court ruled that our *Specialized Common Carrier* decision, *supra,* did not limit Other Common Carriers to providing only private line services over their existing facilities. AT&T states that it does not dispute that holding for purposes of this proceeding. However, AT&T con-

tends that the *Execunet* decision did not alter the Commission's finding that MCI's Execunet service and other similar services are not private line services, nor did the Court address AT&T's interconnection obligations, if any, to the OCCs for the provision of non private line services. Under existing law, argues AT&T, it is required to interconnect its facilities with the OCCs for the provision of only private line services. Because the Commission has determined that Execunet type services are not private line services, AT&T maintains that it is not now legally required to interconnect with the OCCs to enable them to provide other than private services. Before the Commission can order AT&T to interconnect, argues AT&T, a hearing pursuant to Section 201(a) of the Communications Act is required so as to enable the Commission to ascertain whether the interconnection of AT&T's local exchange services for the provision of non private line services by the OCCs would be in the public interest. Because a hearing on that issue has not been held, AT&T concludes that it is under no present obligation to offer its local exchange facilities to the OCCs for the provision of Execunet/MTS type services.

4. AT&T advances four legal arguments in support of this position. First, AT&T contends that the Commission specifically determined in its Docket No. 19896 proceeding, *Bell System Tariff Offerings, supra,* that the extent of AT&T's Section 201(a) interconnection obligation with respect to the specialized carriers was limited to private line services, and did not encompass public message services. AT&T directs our attention to a portion of the Commission's decision which focuses on whether FX and CCSA are private line services and asserts that such an analysis would have been pointless if AT&T's interconnection obligation

went beyond connections for private line services. *See also Bell Tel. Co. of Pennsylvania, supra,* 503 F. 2d at 1273.

5. Second, AT&T avers that in the *Specialized Common Carrier* proceeding, the Commission had before it only applications by OCCs to provide private line services. Consequently, when the Commission ruled in Docket No. 19896 that AT&T already had a Section 201(a) hearing with respect to interconnection of the OCCs in the *Specialized Common Carrier* proceeding, it is obvious, reasons AT&T, that the Commission was considering only whether the public interest would be served by requiring AT&T to interconnect its local exchange facilities for private line services, and not for public message services. Thus, AT&T concludes that the *Specialized Common Carrier* proceeding does not constitute a hearing or contain the public interest findings necessary to impose a present obligation upon AT&T for it to provide public exchange service connections for use by the OCCs for other than private line services.

6. Third, AT&T states that recent Commission decisions have explicitly restated that the *Specialized Common Carrier* proceeding did not require carrier-to-carrier interconnection for other than private line services, and that before the Commission can order such interconnection on the part of local telephone companies, a Section 201(a) hearing must be conducted. *See Southern Pacific Communications Company* (*"SPRINT II"*), 63 FCC 2d 309, 320 (1977), *MCI Telecommuncations Corporation* (*"SPLS II"*), 63 FCC 2d 237, 247 (1977).[3] Further-

[3] The *SPRINT II* and *SPLS II* decisions were vacated and remanded for reconsideration after AT&T filed its petition. *MCI Telecommunications Corp.* v. *FCC*, No. 76-2071 (D.C. Cir., February 3, 1978).

more, AT&T states that these decisions also have made it clear that it has no interconnection obligation for non private line services because without an interconnection hearing and decision, such interstate services could currently be terminated by the specialized carriers only through resale of local exchange service obtained under an intrastate tariff. This, in turn, would violate the general requirement that all portions of an interstate service be offered pursuant to an interstate tariff on file with this Commission. Until we conduct a hearing pursuant to Section 201(a) of the Act to determine whether it is in the public interest to terminate specialized interstate services via facilities used in common with public message services, then AT&T contends that such services could not be lawfully terminated because no interstate tariffs are on file which offer such termination service or facilities.

7. Fourth, AT&T contends that the reason the *Execunet* court concluded that the specialized carriers were not restricted to the provision of private line services over their existing authorized facilities was because the Commission had made no inquiry into whether competition for public message services was in the public interest, and therefore, the Commission had no basis upon which to restrict the specialized carriers from providing non private line, Execunet-type services. The Court did not address the scope of AT&T's interconnection obligation for such services. But implicit in the Court's holdings, states AT&T, is that the Commission also made no public interest finding which could require AT&T to provide connections and services to be used by the OCCs for the equivalent of public message services. Until

a Section 201(a) hearing is conducted into these issues, argues AT&T, the Commission cannot conclude that the public interest requires interconnection for non private line services.

8. AT&T's next major argument is that before the interconnection question is ever reached, the Commission must first determine whether it is in the public interest for OCCs to provide MTS/Execunet-type services, i.e., services that would directly compete with the switched public message telephone network. In *Execunet,* the Court stated:

> we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. 561 F. 2d at 380.

Accordingly, AT&T claims that in the absence of a threshold determination by the Commission that Execunet-type services are in the public interest, it cannot be said that AT&T is under an existing obligation under Section 201(a) of the Act, or otherwise, interest would be served by authorizing the OCCs to enable them to provide non private line services. AT&T contends that the Commission must first be in a position to determine whether and how the public interest would be served by authorizing the OCCs to provide MTS services before it can require AT&T to interconnect with the OCCs for the provision of those services.

9. Next, AT&T asserts that the public interest would be disserved if AT&T were now to provide additional facilities and connections for use by OCCs in furnishing non private line services. To provide these

additional facilities and connections to the OCCs prior to a determination that it would be in the public interest to do so, states AT&T, could embark the industry on an irreversible course of intercity MTS competition without the Commission ever having considered the implications of such competition to the public, the carriers, and the industry.

10. Finally, AT&T requests the Commission to act expeditiously on its petition because it anticipates, in the wake of the *Execunet* decision, receiving requests from OCCs for facilities and connections to local exchange services for their use in the provision of MTS/Execunet-type services. Moreover, because AT&T believes no interconnection obligation for such services currently exists, and because AT&T believes the Commission has addressed this precise question in its Docket 19896 proceeding and determined that such connections would not be in the public interest, it states that it will await the Commission's ruling on the instant Petition before it processes any interconnection requests by the OCCs for non private line exchange services.

B. CONTENTIONS OF PARTIES IN OPPOSITION

11. MCI and SPC present the principal arguments against AT&T's petition for declaratory relief. Accordingly, our presentation of the arguments in opposition will concentrate primarily upon the MCI and SPC pleadings. To the extent that other parties have submitted arguments different than those advanced by MCI and SPC, however, they also will be given specific attention.

12. SPC begins by contesting AT&T's argument that the *Specialized Common Carrier* proceeding

limited AT&T's obligation to provide facilities and connections to OCCs for only private line services. SPC argues that *Specialized Common Carrier* did not restrict the new specialized carrier applicants to private line services, but authorized competition in the broader specialized communications field to include a full range of new and innovative service offerings. SPC points to Datran's authorization to provide a switched all digital end-to-end network, as opposed to other applicants then before the Commission which proposed only point-to-point, rather than switched, services. SPC states that Datran's service would not have met the essential criteria of a private line service set forth in the Commission decision in *Execunet*. Therefore, SPC concludes that AT&T cannot now contend that its interconnection obligation is limited to private line services when AT&T had an obligation to provide interconnection to Datran for its fully switched, non private line service.

13. Next, both MCI and SPC disagree with AT&T that *Specialized Common Carrier,* Docket 19896, and *Bell Tel. Co. of Pennsylvania* require AT&T to provide interconnection to OCC's for only their private line services. It is the position of MCI and SPC that AT&T must provide interconnection facilities to OCC's for all their authorized services, and that AT&T can treat the OCCs no differently than it does its own Long Lines Department. First, SPC and MCI argue that the *Specialized Common Carrier* decision made no mention of limiting AT&T's interconnection obligation to private line services, but included all specialized carrier communications services. Second, these same parties vigorously argue that the Commission decision in Docket 19896 prohibited AT&T from en-

gaging in conduct which would result in denial or unreasonable delay "in establishing physical connections with MCI and other specialized common carriers for their presently or hereafter authorized interstate and foreign communications services." 46 FCC 2d at 439. Consequently, SPC maintains that when these decisions are read together, the test of AT&T's interconnection obligation is not whether an OCC service is a private line service, but whether the service has been authorized. If the service is authorized, then, states SPC, AT&T is bound to provide interconnection facilities. MCI points out that the question of whether Execunet and similar services are authorized was specifically addressed in the *Execunet* case, where the Court held that MCI was authorized to provide Execunet service over its existing facilities. Therefore, argues MCI, AT&T is legally obligated to furnish interconnection so that its service can be provided. MCI contends that AT&T's present refusal to interconnect its monopoly local distribution facilities to allow MCI to provide a service that the Court determined MCI was authorized to provide would constitute a total abnegation of the Court's mandate.

14. With respect to AT&T's argument that the Commission and Court discussions concerning AT&T's interconnection obligations for FX and CCSA imply that such obligation extends only to private line services, MCI states that the reason these two private line services were the focus of the Docket 19896 proceeding was because AT&T had refused to provide interconnection for them. But in addressing these two services, MCI contends that the Commission did not abandon or limit the broad basis of its holding regarding the interconnection of "all authorized serv-

ices." MCI supports this argument by quoting a passage from Docket 19896 which states, "that Bell is to provide interconnection facilities for all authorized carriers, including FX and CCSA." 46 FCC 2d at 427.[4]

15. SPC counters AT&T's contention that a hearing pursuant to Section 201(a) of the Act must be held before the Commission can order AT&T to interconnect with the OCCs for the provision of other than private line services by submitting two reasons why such a hearing is not required. First, SPC argues that the initial clause of Section 201(a) establishes the duty of every common carrier to furnish service upon "reasonable request." It is unnecessary to proceed to the second clause to establish the obligation of AT&T to provide the requested service or facility, states SPC, if the request is reasonable. Second, SPC believes that if a hearing is required by Section 201 (a), such opportunity has already been afforded to AT&T on previous occasions, and AT&T did not present arguments against such interconnection when given the opportunity to do so.

16. SPC argues that the only possible reason that AT&T could consider its interconnection request to be unreasonable is because Execunet-type services would involve the resale or sharing of local exchange facilities and some intrastate tariffs may prohibit this. However, SPC claims that when facilities are used solely for interstate purposes, restrictions in an intrastate tariff are preempted by federal policies where the two conflict. Therefore, if the federal authority authorizes an interstate service, and conflict

[4] SBS strongly supports this argument.

with a local tariff is preempted, then the request is not unreasonable. ARINC carries this argument a step further by contending that once an interstate service has been authorized by the Commission, then only technical incompatibility would make such a request unreasonable, and absent that factor, Section 201(a) would require AT&T to furnish local exchange facilities so that the authorized interstate service could be provided.

17. If the Commission believes the first clause of Section 201(a) does not apply here, then SPC contends that the "opportunity for hearing" required by the second clause has already been afforded to AT&T, and therefore, the Commission must rule that AT&T's interconnection obligations include providing facilities for Execunet-type services. SPC states that AT&T was given numerous concrete opportunities to establish how such interconnection could disserve the public interest when it was presented with actual tariff filings proposing such interconnection. See *Execunet,* 60 FCC 2d 25 (1976); *Southern Pacific Communications Company* (SPRINT 1), 61 FCC 2d 144 (1976); *MCI* (SPLS 1), 61 FCC 2d 131 (1976); *Southern Pacific Communication Company,* (SPRINT II), *supra* and *MCI* (SPLS II), *supra* (1977). SPC argues that AT&T failed to demonstrate in these proceedings that some public interest reason exists why the Commission should not require interconnection for non private line services. Moreover, SPC states that *Bell Tel. Co. of Pennsylvania* makes it clear that a distinct full evidentiary hearing is not required by Section 201(a). Consequently, AT&T has been afforded the "opportunity for hearing" mandated by Section 201(a), and having failed to make its case, the Commission may

now lawfully order the interconnection necessary for authorized carriers to provide Execunet-type services without further hearing and as a part of this proceeding.

18. AT&T's argument that a public interest finding is a condition precedent to any ruling by the Comission on AT&T's obligation to provide local interconnection to OCCs for MTS/Execunet-type services, states SPC, is misplaced. In fact, SPS contends that with respect to MCI's Execunet service, and similar authorized service offerings of SPC, AT&T's argument is the reverse of the process contemplated by the *Execunet* Court. In the *Execunet* case, SPC maintains that the Court ruled that MCI has always been authorized to provide its Execunet service, and that until the Commission initiates and completes a proceeding which would restrict these authorizations, Execunet and comparable services of other carriers possess the same legal validity as any other authorized service, and therefore, must be interconnected. The threshold issue described by AT&T may be relevant in a proceeding initiated by the Commission to restrict the scope of future authorizations, argues SPC, but not to restrict the authorizations for existing service categories that the *Execunet* Court determined to be without limitation for existing facilities.

19. If the Commission were to grant AT&T's petition, MCI, SPC, and the Department of Justice contend that such action would raise serious antitrust implications. All three of these parties rely heavily on an established principle of antitrust law known as the "bottleneck" or "essential facilities" doctrine. This principle establishes a general obligation upon those who control access to essential facilities to make such

available to actual or potential competitors without unreasonable restriction. All three parties cite *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 377 (1973) in support of this principle. To be an essential facility, it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. See *Hecht* v. *Pro-Football, Inc.*, F. 2d D.C. Cir., No. 75–1819, December 20, 1977, pp. 17–19) which MCI and SPC both cite. The parties then state that AT&T has a de facto monopoly control of local distribution facilities, that these facilities are essential to the provision of their authorized Execunet-type services, and that it is impractical, if not impossible, for the specialized carriers to duplicate these facilities. Accordingly, AT&T's denial of an obligation to interconnect with the OCCs for provision of its authorized services is a classic example of the "essential facilities" doctrine and, the parties argue, cannot be countenanced by the Commission because it would be a violation of the antitrust laws and contrary to the public interest. Telenet argues that AT&T's obligation to provide non-discriminatory access to its monopoly local exchange facilities for authorized services is broader than, and exists independently of the Commission's holdings in Docket 19896, or even Section 201(a) of the Act. Where a carrier has essential control over monopoly facilities, Telenet argues the interconnection obligation arises out of the Sherman Act, and interpretations thereof, proscribing a monopolists "refusal to deal." Both Telenet and SBS contend that if AT&T is relieved of its obligation to provide connections for MCI's Execunet Service, then the authorization found by

the Court to have been made for that service would be virtually nullified. MCI states further that a denial of AT&T's petition would be in keeping with our policy of full and fair competition established in *Specialized Common Carrier*. The Department of Justice also argues that the *Execunet* decision held that AT&T possesses no de jure monopoly, and therefore, AT&T cannot be granted its request for expedited relief so as to deny competing carriers access to essential local loop facilities in order to preserve its monopoly position of intercity service.

20. With regard to another antitrust matter, the Department of Justice states that those who advocate restrictions on competition have the burden of proving, with facts, that such restrictions are in the public interest. The Department believes that AT&T's petition fails to meet this threshold burden, and therefore must be denied. AT&T's mere assertion that its revenues and pricing policies would be adversely affected if interconnection for Execunet-type services was provided to the OCCs, contends the Department, is obviously insufficient to act as a basis for the protection AT&T seeks. Under *Carroll Broadcasting Co.* v *FCC*, 208 F. 2d 440 (D.C. Cir. 1958), a case relied on by the *Execunet* Court, the Department urges that we cannot equate injury to regulated firms with injury to the public interest. The *Carroll* case, contends the Department, stands for the proposition that competitors may severely injure each other to the great benefit of the public. Absent a factual showing of harm to the public by AT&T, the Department states that the Commission cannot assume that preserving AT&T's de facto monopoly over MTS/Execunet-type services is desirable in the public interest. Finally,

the Department concludes that for the past twenty years AT&T has predicted cataclysmic effects from the procompetitive rulings of the Commission and courts, and, as yet, no evidence has surfaced to indicate that competition has caused a deterioration in service or an increase in rates to any class of customers. Therefore, the Department urges that we deny AT&T's petition and refrain from instituting a hearing into whether AT&T should be required to interconnect for non private line services, unless AT&T can make some initial showing as to why such a restriction would serve the public as distinguished from its own corporate interests.

21. Telenet and ASC believe that AT&T's attempt to limit its present interconnection obligation to OCCs for the provision of services which are private line services is too ambiguous and creates the potential for abuse. ASC strenuously objects to allowing AT&T to become the final arbiter of what constitutes a permissible private line service for purposes of interconnection. ASC believes that this would put the OCCs in the untenable position of proving to AT&T that every new service offering was not an Execunet-type or other non private line service. ASC argues that the authority to evaluate the public interest justifications for any new service should not be delegated to AT&T. Therefore, ASC requests that the Commission limit its review to whether Execunet service must be presently interconnected, and not to the more general issue of interconnection of OCC services.

22. Telenet states that the OCC concept is one of AT&T's design, and therefore, AT&T could change its view of what constitutes an OCC at any time. While this could lead to abuse, Telenet contends that regardless of how AT&T chooses to classify a com-

mon carrier, AT&T nevertheless has an obligation to provide access to monopoly facilities which are essential to the provision of any service authorized and certificated by the Commission.

C. COMMENTS OF OTHER PARTIES

23. The international record carriers (IRCs), ITT Worldcom, RCA Globcom and WUI have all expressed concern that the language used in AT&T's petition to describe the extent of its interconnection obligations is overly broad, and if sustained by the Commission, could be construed to allow AT&T to refuse interconnection with the IRCs for their non private line services. The specific language at issue is AT&T's statement that:

> this pleading concerns only whether Petitioners have a duty to provide to MCI and other OCCs additional facilities and connections to Petitioner's exchange services *for use by OCCs in their provision of Executive-type services or any other offering which is not a private line service.* (Emphasis added)

Because AT&T categorizes the IRCs as OCCs, and because the international telex and dataphone-type services offered by the IRCs are not private line services, these parties contend that a literal application of the language in the AT&T petition could permit AT&T to refuse the IRCs interconnection facilities for these services. The IRCs state that interconnection for those international services raises entirely different issues than those involved in the AT&T dispute with the domestic specialized carriers. Accordingly, the IRCs request that we distinguish the AT&T/IRC interconnection matters and expressly limit the AT&T petition to those matters involving the

interconnection of domestic specialized carriers to the public switched telephone network.

24. CBEMA, ADAPSO and Graphnet have also noted their concern that the above-cited sweeping language used by AT&T in its petition, if granted by the Commission, could be used by AT&T to deny interconnection to local exchange services which are essential to the provision of services authorized for value-added carriers and for OCCs offering specialized data and alternate voice/data services. Moreover, these parties contend that AT&T's "unspoken definition of private line services" could create substantial confusion if AT&T's declaration is granted. ADAPSO contends that the decisions relied on by AT&T to define its interconnection obligations to OCCs apply only to voice use private line services. Accordingly, CBEMA, ADAPSO,[5] and Graphnet request that whatever action is taken, the Commission should not alter AT&T's present interconnection obligations to these carriers, and in addition, should expressly incorporate the Commission's prior definitions and discussions of what constitutes a private line service.

D. COMMENTS IN SUPPORT

25. GTE agrees with AT&T that its present legal obligation to interconnect with the specialized carriers is limited to private line services. In support of this argument, GTE stresses the representations made

[5] ADAPSO has also filed a "Motion to Respond to American Telephone and Telegraph Company." ADAPSO made this request based on its concern that the scope of AT&T's requested relief might not be adequately clarified by AT&T in its Reply. In order to expedite our ruling in this matter, we hereby deny ADAPSO's request. However, we believe ADAPSO's concerns have been directly addressed in n. 2, *supra*.

by counsel for MCI in the *Specialized Common Carrier* proceeding. At that time, GTE observes that it was MCI's intention to provide only private line services which were the equivalent of private microwave. When the Commission subsequently ordered AT&T to interconnect with the specialized carriers for their authorized services pursuant to *Specialized Common Carrier,* GTE argues that the interconnection order obviously extended to only private line services because those services were the only kind the specialized carriers were authorized to provide. Since the decision in *Execunet* did not upset the Commission's determination that Execunet service is not private line service, GTE contends that before AT&T can be required to interconnect, a hearing pursuant to Section 201(a) must be held to ascertain whether interconnection to local exchange services should be provided to the specialized carriers for the provision of Execunet/MTS type services.

26. USITA reminds the Commission that the independent telephone companies are also subject to the policies announced in *Specialized Common Carrier,* and that these companies agree with AT&T that a hearing is required before the Commission can order the independent carriers to offer interconnection to the OCCs for the provision of non private line services. Moreover, the Commission must make a fundamental public interest determination "whether competition like that posed by Execunet is in the public interest," *Execunet,* 561 F. 2d at 380, states USITA, before it can require the telephone companies to interconnect for these services.

27. Continental asserts that a Section 201(a) determination has never been made with respect to the interconnection of non private line services. Conti-

nental argues that the *Execunet* decision actually supports AT&T's position because it left to the Commission the question of whether the provision of Execunet-type services by specialized carriers is in the public interest. By recognizing that the Commission has never made such a public interest finding, Continental contends that the Court implicitly acknowledged that there could not have been a previous Section 201(a) finding that the public interest mandates interconnection of these services with local exchange facilities. Accordingly, Continental believes that the *Execunet* decision confirms AT&T's obligation to interconnect with the specialized carriers for only private line services.

28. In a separate petition, Continental states that in the wake of the *Execunet* decision, MCI, SPC, and ITT's United States Transmission Systems, as well as other specialized carriers, will be seeking to offer Execunet/MTS type services because no affirmative public interest determination pursuant to Section 214 (c) of the Act, 47 U.S.C. § 214(c), has yet been made to restrict the facilities authorizations of the specialized carriers to private line services, as required by *Execunet*. Therefore, Continental argues that these carriers are now free to offer services that are essentially the same as, and compete directly with, message toll service. Continental claims that if the growth of Execunet-type service by means of the existing facilities authorizations is not temporarily halted pending a hearing as to whether it is in the public interest for specialized carriers to provide such services, the competitive responses of the established carriers will lead to an abandonment of nationwide rate averaging and a reduction or elimination of con-

tributions from message toll services to local exchange carrier revenue requirements. The toll settlement contribution from message toll service amounts to over 60 percent of Continental's revenue requirement, and if some of these contributions were diverted by reason of competition for MTS services, then Continental maintains that this could irreparably disrupt its current pricing policies, with a significant impact upon its telephone subscribers. Furthermore, Continental argues that if the growth of Execunet-type services is left unchecked, additional interconnects would disrupt the marketplace, confuse the public concerning continued availability of these services and promote expansion of specialized carrier facilities that could prove wastefully duplicative. Should the Commission subsequently decide that these services are not in the public interest, a decision to eliminate or condition the services would then become exceedingly difficult to implement, states Continental. Accordingly, Continental requests the Commission to utilize the broad statutory authority conferred upon it by Section 4(i) of the Act, 47 U.S.C. § 154(i), to prevent further growth of Execunet-type services pending resolution of the vital question of whether competition in the MTS marketplace is in the public interest. Continental states that in *U.S.* v. *Southwestern Cable,* 392 U.S. 157 (1968), the Supreme Court specifically affirmed the Commission's authority under Section 4(i) to issue interim orders preserving the status quo until the Commission can make a determination as to whether the expansion of a regulated service is in the public interest.

29. For the same reasons described above, USITA joins Continental in its request to preserve the specialized carrier situation as it exists at the moment.

E. AT&T'S REPLY

30. AT&T begins its reply by framing what it believes is the critical issue now before the Commission—"whether the Commission has ever ordered the Bell System to interconnect its facilities with those of MCI and other specialized carriers for their use in providing the functional equivalents of message telephone service." AT&T states that its petition does not request the Commission to adopt new interconnection policies or to retreat from existing ones, but requests only that the Commission affirm its past interconnection policies by ruling that AT&T has no present obligation to provide additional connections to local exchange facilities to OCCs for their use in providing Execunet-type services. In this respect, AT&T responds to the contentions of the IRCs and value-added carriers that the petition could be construed to alter their present interconnection arrangements. AT&T assures these carriers that the services they now provide "are not functionally equivalent to MTS; thus, if granted, the Petition would not affect the provision of connections to IRCs or value-added carriers for such services."

31. Next, AT&T disagrees with the comments of the Department of Justice that it has not satisfied all preconditions to the grant of declaratory relief. In stating that AT&T has failed to make a "factual showing of harm" in support of its petition, the Department of Justice, states AT&T, clearly misunderstands the issue. AT&T argues that it is seeking only a determination of its legal obligations under existing Commission orders, and is not seeking relief from outstanding obligations. Only in the latter case, argues AT&T, might a factual showing of harm be relevant. AT&T

also disagrees that its petition seeks creation of a de jure monopoly for intercity services, as the Department of Justice believes. Rather, states AT&T, the only determination sought is whether it has an obligation under prior Section 201(a) orders to interconnect with the OCCs for their provision of non-private line services.

32. AT&T next asserts that the orders in Docket 19896 clearly establish the Bell System's interconnection obligation with respect to private line services, but do not, as the Oppositions argue, require interconnection for all authorized OCC services. In Docket 19896, no OCC sought to establish or justify interconnections for Execunet-type services, states AT&T, and therefore that proceeding cannot be deemed to have provided the notice, opportunity for hearing, and public interest findings required by Section 201(a) to establish such an interconnection obligation. Furthermore, since a policy of competition for public switched message services has never been adopted by the Commission, AT&T contends that it cannot now be said that the existing Commission interconnection orders require it to provide connections to OCCs so that they can offer such services. Finally, AT&T states that repeated statements throughout the Docket 19896 proceeding clearly indicate that its scope was limited to private line services. In fact, argues AT&T, when the Third Circuit affirmed Docket 19896 in *Bell Tel. Company of Pennsylvania, supra,* it rejected AT&T's argument that the Commission's interconnection orders were unduly vague and overbroad on the express representations made by MCI, SPC, and the Commission that the interconnection obligation extended to only private line services. See 503 F. 2d at 1273–74.

33. With respect to the argument made by SPC and ARINC that the first clause of Section 201(a) itself establishes an interconnection obligation, AT&T maintains that such an interpretation of the statute is contrary to its plain language. That clause, states AT&T, does not deal with carrier interconnection, but with the provision of communications services to customers. The second clause deals with physical connection to other carriers and requires a hearing to determine if such a connection is in the public interest.

34. Turning to the *Execunet* decision, AT&T asserts that the Court's mandate directs only what the Court has said in its opinion and judgment. Because neither the opinion nor the judgment discusses or decides whether the Bell System has a legal obligation under Section 201(a) to provide connections to MCI for Execunet-type services, then AT&T disputes MCI's contention that the mandate compels the provision of additional connections for Execunet service. AT&T argues that in resolving the authorization question, the Court did not have to decide the interconnection question, nor did it do so. Moreover, AT&T disagrees with MCI's assessment that the entire *Execunet* proceeding will be rendered futile if interconnection is denied. Because the *Execunet* decision found that MCI was authorized to provide Execunet service, then AT&T argues that this places MCI in a position to request the Commission to expand the Bell System's interconnection obligations under Section 201(a) of the Act. Because the Court did not decide the issue, states AT&T, does not render the decision a futility. AT&T also maintains that since the Commission in *Execunet* did not decide the scope of AT&T's interconnection obligation in relation to pub-

lic switched message services, such as Execunet, that the Court would have violated the separation of function between an administrative agency and a court by deciding an issue, such as interconnection, which was never presented to that court.

35. In reference to the antitrust "essential facilities" doctrine which SPC, MCI and the Department of Justice use in support of their theory that AT&T's monopoly control over local distribution facilities creates an obligation upon AT&T to make these facilities available to competitors, AT&T answers that these antitrust arguments rest on false assumptions. First, AT&T argues that this is not a de novo proceeding under Section 201(a) where such an argument might be made to establish a new interconnection obligation. The absence of such a hearing, argues AT&T, is exactly why the relief it seeks is warranted. Second, AT&T contends that even in a new Section 201(a) proceeding to establish interconnection obligations, under the Communications Act it is the public interest standard which governs and not antitrust law. AT&T cites *FCC* v. *RCA Communications,* 346 U.S. 86, 93 (1953); *Hawaiian Telephone Co.* v. *FCC,* 498 F. 2d 771 (D.C. Cir. 1974) and *Satellite Business Systems,* 62 FCC 2d 997 (1977), among other cases, to support its argument that competitive considerations are only one part of the public interest standard, and that the Commission cannot presume, as does antitrust law, that competition is in the public interest. AT&T argues that the *Otter Tail* case relied upon by the Oppositions clearly distinguished antitrust principles from the public interest regulatory standard involved therein, and concluded that while antitrust consideration might be relevant, they are

not determinative. Finally, AT&T states that even in an unregulated industry, the antitrust cases do not support such a broad reading of the "essential facilities" doctrine as advanced by the Oppositions.

36. AT&T next states that it has never acknowledged any obligation to provide interconnection for Execunet and is not estopped from raising the issue. The reason the Bell System originally provided interconnection facilities for Execunet, states AT&T, was because it was not aware of the true nature of the service. The *Execunet* proceeding dealt with the lawfulness of this service offering, and not to interconnection. Hence, AT&T contends that because this issue was never raised, estoppel principles do not apply.

37. Finally, AT&T maintains that the relief requested will preserve the Commission's ability to determine the public interest. If the Bell System were required to provide additional connections for Execunet-type services, without a Section 201(a) hearing, then AT&T argues that the OCCs have enough intercity facilities already in place to alter substantially the present structure of the nation's telecommunications industry. By granting AT&T's petition, AT&T believes the Commission can avoid such deleterious consequences and thereby retain its ability to determine what should be the appropriate structure of the industry, and whether competition in public switched message services would serve the public interest.

F. OTHER REPLY COMMENTS

38. MCI contends that the language of the *Bell System Tariff Offering* order stating that AT&T is obligated to interconnect for all presently or here-

after authorized services settles the question presented by AT&T's petition. MCI also says that telephone company assertions that the telephone companies will suffer financial injury if MCI continues to provide Execunet service are unfounded.

39. USITA contends that the basis for this current dispute involves differing interpretations of the *Execunet* decision. The *Execunet* case simply held, argues USITA, that the Commission commited reversible error in rejecting the Execunet tariff on the grounds that MCI's facility authorizations were restricted to private line services. However, USITA contends MCI and SPC interpret the decision as authorizing Execunet-type services by the specialized carriers and that AT&T must therefore furnish local exchange facilities for all authorized services under the holding in *Bell Tel. Company of Pennsylvania* v. *FCC*. USITA asserts that *Execunet* did not authorize anything, and specifically left to the Commission the question of "whether competition like that posed by Execunet is in the public interest." 561 F. 2d at 380. USITA argues that if the Commission cannot now correct the judicially found error by conditioning the specialized carrier's authorizations, as MCI would have it, then the Commission will have lost control of its licensing processes.

40. GTE observes that neither MCI nor SPC has shown that Execunet-type services fit within the scope of private line services, and therefore, argues GTE, they fail to support their conclusion that terminating facilities must be provided. In this regard, USITA states that telephone company's local exchange facilities are not the only way by which MCI or SPC may reach their customers. Other available options recognized by the Commission in *Specialized Common Car-*

rier, states USITA, are customer provided facilities or specialized carrier facilities. In arguing the "essential facilities" doctrine, USITA contends that the Department of Justice overlooked these alternatives.

41. SPC's reliance on Datran's authorization for a switched data service as proof that the specialized carriers were given authority to provide other than private line service, argues GTE, is incorrect. Datran proposed to offer data transmission links, and in 1970 and 1971, GTE asserts these were "generally understood to be private line." Finally, GTE states that the Department of Justice position urging immediate expansion of Execunet-type services ignores the requirements of Sections 1 and 214 of the Communications Act, 47 USC §§ 151, 214. Because Execunet-type service has been found by the Commission to be equivalent to MTS, GTE asserts that *Execunet* did not prohibit the Commission from limiting the expansion of this service until further analysis and hearings can be held.

DISCUSSION

II. BACKGROUND

42. In 1970 we instituted a rulemaking proceeding to examine common policy questions presented by a large number of applications from entities other than AT&T and Western Union for authority to construct facilities to provide specialized interstate common carrier communications services. *Specialized Common Carrier Services,* 24 FCC 2d 318. Some of those applicants such as Data Transmission Corporation (Datran) proposed to provide specialized services which were substantially different from any service then being offered by the established carriers. Other applicants proposed to provide specialized services which

appeared to be competitive with existing specialized services of established carriers which the established carriers had traditionally described as "private line" services. After extensive proceedings, we concluded that "a general policy in favor of entry of new carriers in the specialized communications field will serve the public interest * * *" *Id.* at 920.

43. Existing carriers filed comments in that proceeding opposing new entry. AT&T alleged that the entry of new carriers in the interstate communications market would adversely affect the public interest, claiming in particular that "cream-skimming" by new entrants providing service on major intercity routes would undermine the nationally-averaged uniform rate structure which then prevailed for all intercity services and would deprive the public of the benefits of economies of scale by delaying the installation of large capacity facilities. *Id.* at 910. USITA expressed concern that new entry would result in reduced revenue settlements to local independent telephone companies from existing intercity carriers which would have an adverse impact upon the independent telephone companies' ability to provide local exchange service. *Id.* at 914, n. 37. The nature of USITA's concern is more fully described in our First Report in Docket No. 20003 (Economic Inquiry), 61 FCC 2d (1976). Under existing separation and settlement procedures, a portion of the revenues from interstate message telephone toll service (MTS) and wide area telephone toll service (WATS) are returned to the local telephone operating companies in payment for the use of local exchange facilities in rendering interstate services. A reduction in the amount of interstate revenues returned to the local telephone companies through this process, which could result from either

diversion of interstate traffic and revenues to a specialized carrier not subject to the separations and settlement proceedings or from a repricing of MTS and WATS to meet specialized carrier competition, would allegedly force local telephone companies to raise rates for local exchange service to cover their relatively fixed operating costs.

44. Our *Specialized Common Carrier* decision concluded that entry of the new carriers could not produce the kind of impact claimed by AT&T "in view of the very small percentage of AT&T's existing market that is vulnerable to competition of the kind proposed here" (*id.* at 910) and that the independent telephone companies would not be adversely affected (*id.* at 914). We noted that "the portion of AT&T's total business which might be jeopardized, i.e., the interstate private line business, represented only a very small fraction of Bell's total revenues" (*id.* at 911) and declared that "it is difficult to visualize how independent telephone companies would be adversely affected." (*id.* at 914).

45. The *Specialized Common Carrier* decision also addressed the problem of providing local distribution for interstate services of the new carriers and declared "that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier." *Id.* at 940.

46. In the summer of 1973, MCI advised the Commission that AT&T was refusing to interconnect with

MCI for the provision of services which the AT&T Long Lines Department provides to its private line customers. After letters from the Chairman of the Commission and the Chief of the Common Carrier Bureau failed to resolve the dispute, the Commission instituted a proceeding to clarify AT&T's interconnection obligations with the specialized common carriers. 44 FCC 2d 245 (1973). We rejected AT&T's contention that specialized common carrier services do not encompass private line services such as FX or CCSA which require interconnection with the public switched telephone system. *Bell System Tariff Offerings, supra.* We concluded that the *Specialized Common Carrier* decision contemplated that the new carriers would be authorized to offer services which compete with interstate private line services offered by AT&T, including private line services which must interconnect with or utilize a part of the switched public telephone network.

47. Paragraph 53(a) of the *Bell System Tariff Offerings* Order (46 FCC 2d at 438) directed AT&T to:

> (a) Furnish to MCI Telecommunications Corporation, MCI New York West, Inc. and other specialized common carriers the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services, including interconnection by the specialized carriers into a telephone company's local exchange facilities for the purpose of furnishing Foreign Exchange (FX) service or for insertion into telephone company Common Control Switching Arrangements (CCSA);

48. AT&T filed a petition for review in the United State Court of Appeals for the Third Circuit. AT&T challenged the decision on various grounds including the alleged "overbreadth" of the interconnection order. The brief filed in that Court on behalf of the Federal Communications Commission and the United States observed (Brief, p. 49, n. 14):

> AT&T also argues that the Commission's cease and desist order is overly broad in stating that interconnection is required for services "hereafter" authorized. Read in context, however, it is clear that the Commission was saying that MCI and the other specialized carriers were to be afforded the same service as Long Lines and the independent telephone companies. See *FTC* v. *Cement Institute*, 333 U.S. 683 (1948). "Hereafter" simply embraces those private line services which Long Lines and the independents provide or may provide, and which the specialized carriers do not *now* provide but may become authorized to provide in future proceedings. The Commission included this language in recognition of the developing nature of the industry and in the interest of averting further litigation in an area of well defined policy. See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *NLRB* v. *Local 282 International Brotherhood of Teamsters*, 428 F. 2d 994 (2d Cir. 1970). The breadth of the order is modified still further: Every time the word "hereafter" appears, it is followed by the word "authorized." Thus, only after authorization is obtained from the Commission is interconnection required, and the telephone companies have every right to oppose authorizations in the "hereafter." Finally, if any serious questions arise, AT&T can seek guidance from the Commission. *Lafayette Radio Electronics Corp.* v.

U.S. and FCC, 345 F. 2d 278, 281–82 (2d Cir. 1964).

49. Some of the intervenors' briefs which were filed in that proceeding contained similar observations with respect to the breadth of the interconnection order. The brief for SPC said that the order does not impose an "unbounded" interconnection obligation and that "the Commission obviously was seeking to require the telephone companies to provide the specialized carriers with all private line services (itself a substantial limitation) of the same or similar character." (Brief, p. 61). The brief for MCI said (Brief, pp. 52–53): "[W]hile it is correct that the Commission's language requires Bell to permit physical connections 'essential' for 'all' of the private line services which any of the specialized carriers are now or may 'hereafter' be authorized to offer, the obligation is qualified and limited by the duty set forth in the Decision that such interconnection facilities must be 'similar to, these presently provided to Bell's Long Lines Department on a non-discriminatory basis.'"

50. In its opinion affirming the *Bell System Tariff Offerings* order the Court of Appeals said: "Were we to read the Commission's order in a vacuum, we would be inclined to agree with petitioner that the order is somewhat vague and, to a certain extent, overbroad." 503 F. 2d at 1273. The Court added that orders are not to be read in a vacuum, observed that the Commission opinion "[v]iewed in its entirety * * * operates to preclude AT&T from treating its Long Lines Department and its affiliates differently than it treats the specialized common carriers" (*Ibid.*) and concluded (*Id.* at 1273–1274): "As we read the order, the FCC has required AT&T to pro-

vide to the specialized carriers those (interconnection elements of *private line services* which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department." (emphasis added).

51. Shortly before the Court of Appeals issued its decision affirming the *Bell System Tariff Offering* order AT&T filed revised tariffs covering facilities and services which AT&T furnishes to other carriers including specialized common carriers. We instituted an investigation of those tariffs. AT&T then proposed that we convene and chair negotiations among AT&T and other carriers for the purpose of resolving a variety of technical, operational, and other issues concerning the specific arrangements which would be provided for interconnecting AT&T and other common carrier facilities and services. Several months of negotiation led to a Settlement Agreement which we accepted as a basis for terminating the tariff investigation. *AT&T,* 52 FCC 2d 727 (1975). AT&T filed tariffs implementing that agreement which remain in effect to this date.

52. Meanwhile, MCI had filed revised tariffs on September 10, 1974, which identified a number of "modular" service elements which could be combined to create a variety of service offerings. Although members of our staff expressed concern regarding certain ambiguities in the revised tariff, that tariff was permitted to enter into effect by operation of law on October 10, 1974.

53. In the spring of 1975 AT&T advised us that it believed a metered use service called "Execunet" which MCI was offering pursuant to its modular tariffs was not a private line service and was equiva-

lent to MTS. After reviewing comments filed by both AT&T and MCI, with respect to the nature of Execunet service, we issued an order on July 2, 1975, rejecting the revised MCI tariff as unlawful insofar as it purported to offer Execunet service. That order said that the *Specialized Common Carrier* decision contemplated entry of specialized common carriers in competition with AT&T "only in the private line field, not in the area of switched public message telecommunications service" (60 FCC 2d at 62) and concluded that "Execunet service is essentially a switched public message telephone service, rather than private line." *Id.* at 63. After further proceedings to reconsider that order based on new information developed by MCI, we issued an order affirming our decision to reject MCI's tariff. *MCI Telecommunications Corp.*, 60 FCC 2d 25 (1976) (*"Execunet"*).

54. On review the United States Court of Appeals for the District of Columbia Circuit reversed the *Execunet* rejection order. *MCI Telecommunications Corp.* v. *FCC, supra.* That Court concluded that a facility authorization issued pursuant to Section 214 of the Communication Act, 47 U.S.C. § 214, authorizes a carrier to offer any service which the facility is capable of providing in the absence of a condition adopted pursuant to Section 214(c) which expressly restricts the services which may be offered. The Court noted that the Section 214 authorizations which were issued to MCI prior to our *Execunet* decision do not contain any effective conditions restricting the services which may be provided. The Court also held that neither the *Specialized Common Carrier* decision nor the subsequent facility authorization proceedings contained an adequate finding that MCI's provision of

particular services would be contrary to the public interest and concluded that such a finding is essential to support a restriction on MCI's use of its facilities. The Court of Appeals held that we erred in rejecting the tariff on the grounds that MCI did not have the requisite authority to use its existing facilities to provide Execunet service. The Court's opinion did not address MCI's contention that we also erred in rejecting MCI's claim that Execunet is a private line service.

III. PRIOR SECTION 201 ORDERS

55. AT&T's request for a declaratory ruling that it has "no obligation" to provide interconnection to specialized common carriers to enable them to provide services which are not private line services raises two distinct questions. Have we directed AT&T to provide such services in any prior interconnection order issued pursuant to Section 201(a) of the Communications Act, 47 U.S.C. § 201(a)? Does AT&T have any legal obligation to provide such interconnection apart from any Section 201(a) interconnection Order? We will address the first question in this section of the opinion.

Section 201(a) provides in relevant part:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio * * * in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, * * *

56. The *Bell System Tariff Offerings* order is a Section 201(a) interconnection order and Paragraph

53(a) of that order states that AT&T is directed to provide specialized common carriers with interconnection facilities essential to the rendition of *all* of their presently or hereafter authorized interstate and foreign communications. MCI and SPC would read that paragraph in isolation to mean that the order requires AT&T to provide interconnection service to enable MCI to provide Execunet service through facilities which have been constructed pursuant to unconditional or improperly conditioned facility authorizations. However, the Court of Appeals for the Third Circuit concluded that Paragraph 53(a) must be read in context of the entire Commission opinion as requiring interconnection for private line services which are similar to private line services offered by AT&T through interconnection between AT&T Long Lines and Bell System affiliates. That is indeed the interpretation which both we and all parties have given this Order in prior proceedings, and thus the one which we shall continue to accord it in this proceeding. We are bound by the Third Circuit's interpretation of that order. In concluding that the order was limited to private line services that Court had before it representations in the briefs filed by this Commission in conjunction with the United States, as well as those filed by MCI and SPC, with respect to the scope of the order. Therefore, we could not utilize the *Bell System Tariff Offerings* order as a basis for enforcement proceedings to compel AT&T to provide interconnection facilities to any specialized common carrier for any service which is not within the scope of specialized and private line services addressed in the *Specialized Common Carrier* proceeding.

57. None of the comments which have been filed in response to this AT&T petition except AT&T's reply comments discuss the representations contained in brief filed in *Bell Tel. Co. of Pennsylvania* and most of the comments do not discuss the Court of Appeals opinion in that case. MCI and SPC do claim that that Court of Appeals did not attach any significance to the distinction between private line services and other services. MCI says that AT&T's overbreath claim focused upon services which might be authorized in the future and accordingly contends that the Court of Appeals opinion should not be read as limiting AT&T's obligation to provide interconnection for *all* previously authorized services, SPC advances a different interpretation of the opinion. It contends that the Court of Appeals merely sought to limit the broad language of the interconnection order to require Bell operating companies to supply interconnection facilities to specialized carriers which are similar to interconnection facilities furnished to the AT&T Long Lines Department.

58. We cannot accept either of those interpretations of the Court of Appeals opinion. Various parties did represent that the interconnection obligations under the *Bell System Tariff Offerings* order are limited to private line services and that Court did say that it understood the order to be limited to private line services. That statement appeared in the context of a discussion of the reasons which caused that Court to refrain from remanding the matter to the Commission with instructions to draft a narrower interconnection order. We cannot assume that such a remand order would not have been issued in the absence of representations that the interconnection obligations imposed

by that particular order are limited to private line services. Accordingly, the words "all of their presently or hereafter authorized interstate and foreign communication services" in Paragraph 53(a) of the *Bell System Tariff Offerings* order can only be read to mean "all of their presently or hereafter authorized interstate and foreign *private line* communications services." (emphasis added), as the Third Circuit held. *Bell Tel. Co. of Pennsylvania, supra,* 503 F. 2d at 1273–1274.

59. This is an appropriate point at which to address SPC's contention herein that the *Specialized Common Carrier* proceeding did not restrict the new specialized carrier applicants to private line services, in support of which SPC points to Datran's authorization therein to provide a switched all digital data communications network (*see* paragraph 12 above). It is true that the Specialized Carrier decision encompassed specialized communications services other than those which theretofore had been described by the established carriers as "private line" services. It is also true that in the ensuing debate and litigation regarding required interconnection arrangements, the terms specialized communications service was frequently omitted in favor of the more limited term "private line." The use of this abbreviated expression apparently arose as a result of the context in which these issues were raised, i.e., whether the specialized carriers should be accorded the same interconnection rights as were accorded AT&T's internal operations in Bell's offering of "private line" services. We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* inter-

state communication services, including switched digital services such as those developed by Datran. What is germane to the present proceeding, however, is a determination as to what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff Offerings,* and *Bell Tel. Co. of Pennsylvania.* We believe it is clear that MTS and WATS services, and therefore services by other names which are the functional equivalent of MTS and WATS, were excluded from both the considerations and holdings of these proceedings. The interconnection discussion in those opinions can only be read to mean that all telephone companies are required to provide facilities and interconnections which the specialized common carriers may need to provide both conventional private line services and new specialized services which may differ from any private line service which was being offered by the established carriers in June 1971.[6]

60. However, the *Specialized Common Carrier* decision cannot be interpreted as ordering interconnection for the purpose of enabling specialized common carriers to provide services which are substantially equivalent to MTS and WATS from the user's perspective. In the *Specialized Common Carrier* decision we declined to consider arguments that the diversion of MTS or WATS revenues from the existing carriers would produce effects which may be adverse to the public interest because the applicants had indicated that they did not propose to provide any service which would be capable of diverting any

[6] Although the *Bell System Tariff Offerings* order was directed at AT&T, the interconnection provisions of the *Specialized Common Carrier* decision are applicable to all of the telephone companies.

significant amount of MTS or WATS business. 29 FCC 2d at 910–915. If the *Specialized Common Carrier* decision ordered all telephone companies to interconnect with the specialized common carriers for the purpose of enabling the specialized common carriers to provide services which are the functional equivalent of, and thus directly competitive with, MTS or WATS, then all of the telephone companies were deprived of a meaningful opportunity for a hearing with the respect to the public interest consequences not only of such competition but also of such interconnection. Such an action would violate their rights under Section 201(a). We decline to adopt a construction of that decision which is based on the premise that we did deprive the telephone companies of their statutory rights.

61. Our conclusion with respect to the scope of the interconnection order in the *Specialized Common Carrier* decision is entirely consistent with the Court of Appeals opinion in the *Execunet* case. That Court concluded that a Section 214(c) condition requires an affirmative finding that the provision of particular services would be detrimental to the public interest. The Court observed that the *Specialized Common Carrier* proceeding did not constitue a proper hearing on the issue of MTS or WATS competition, and thus could not serve as a proper basis for Section 214(c) restrictions. A Section 201(a) interconnection order likewise requires an affirmative finding, after hearing, that interconnection will be beneficial to the public interest. The hearing issues required to determine the public interest in each of these situations are essentially identical. To determine whether the public interest requires that specialized carrier facility authorizations be limited to preclude their use for MTS-

type services, we must determine whether or not the public interest will be served by the competitive offering of such services. Similarly, to determine whether the public interest requires that local telephone companies be ordered to provide the interconnections required to complete such service offerings, we must also determine whether or not the public interest will be served by the competitive offering of MTS-type services. Neither of these issues has been resolved in prior Commission hearings or proceedings; both will be addressed in the hearing we intend to initiate forthwith in compliance with the remand order in the *Execunet* case.

62. We have noted the Department of Justice's contention that AT&T has the burden of proof because any action which deprives the specialized common carriers of interconnection they need to provide any service will have an anticompetitive effect. Inasmuch as we declined to consider AT&T's "proof" in the *Specialized Common Carrier Services* proceeding, we need not determine whether AT&T would have had the burden if we had attempted to determine whether the entry of specialized common carriers into the MTS–WATS market would be in the public interest. AT&T was clearly entitled to an opportunity for hearing with respect to such questions and it did not receive such an opportunity at that time.[7]

63. The Department of Justice may be suggesting that we should decline to construe our prior inter-

[7] We also declined to address the concerns expressed by USITA in the *Specialized Common Carrier* proceeding because we assumed that the specialized common carriers would not be providing services which could have an impact upon the revenues of the independent telephone companies. Thus, USITA did not receive an opportunity to have its "proof" considered.

connection orders because clarification of those orders may lead AT&T to take actions which are undesirable or unlawful. We could not decline to provide guidance with respect to the scope of prior orders even if clarification produces such a result. We have an obligation to respond to reasonable requests for guidance with respect to the scope of parties' obligations under our orders, particularly where, as here, AT&T is subject to a cease and desist order. As previously noted, the brief filed on behalf of the Federal Communications Commission and United States in the Court of Appeals for the Third Circuit said: "[I]f any serious questions arise, AT&T can seek guidance from the Commission." (Brief, p. 49, n. 14).[8]

IV. OTHER INTERCONNECTION OBLIGATIONS

64. The Communication Act does not preclude carriers from entering into voluntary interconnection arrangements in the absence of a Section 201(a) order. We have not adopted any rule or issued any

[8] We have also noted SPC's contention that AT&T had an "opportunity" for hearing with respect to the desirability of new entry in the MTS–WATS market in subsequent proceedings and failed to avail itself of that opportunity. We must disagree. Consistent with our treatment of this issue in the *Specialized Common Carrier* proceeding, we have explicitly excluded it from consideration in all subsequent proceedings concerning competition in the domestic common carrier industry. While we have examined certain broad economic issues, including the potential effects of competition in the specialized services market on the economics of MTS–WATS, and local exchange services, none of these investigation has explored the social and economic effects of competition in the provision of MTS and WATS. To hold that such broad economic inquiries have provided the telephone industry the "opportunity" for a hearing when the hearing issue was so explicitly excluded would be a clear abuse of due process.

order which would prohibit AT&T from entering into interconnection arrangements with any specialized common carrier to enable that specialized common carrier to provide any service. Accordingly, while we have concluded that prior Section 201(a) orders relating to specialized common carriers do not direct AT&T to provide interconnection for services which are substantially equivalent to MTS or WATS, it remains to be determined whether AT&T has any other legal obligation to provide such services.

A. THE COURT OF APPEALS MANDATE

65. MCI apparently contends that the Court of Appeals mandate in the *Execunet* case either imposes an obligation upon AT&T to provide interconnection for Execunet or requires the Commission to take immediate action to impose such an obligation upon AT&T.[9] MCI has filed a document entitled "Petition for Compliance with Mandate of the Court of Appeals for the District of Columbia Circuit by Enforcing MCI's Right to Local Interconnection for Execunet Service" which has been incorporated by reference in MCI's comments in the instant proceeding. That petition asks this Commission to issue an order directing AT&T to provide the interconnections MCI requires to provide Execunet and all "other authorized services."

66. Although AT&T did intervene as a party in the review proceedings in the *Execunet* case, the Court of Appeals mandate does not direct AT&T to do anything. The judgment states "that the orders of the Federal Communications Commission on review

[9] The SPC and SBS comments present similar contentions.

herein are hereby reversed, and this case is hereby remanded to the Federal Communications Commission for further proceeding in accordance with the opinion of this Court filed herein this date."

67. The Commission orders in the *Execunet* case did not relate to interconnection. No interconnection question was presented in the Commission proceedings or the review proceedings and neither the Commission decisions nor the Court of Appeals opinion purports to discuss the nature of AT&T's interconnection obligations.

68. MCI's contention appears to be based on the premise that the Court of Appeals has determined that Execunet service is desirable and has decreed that no one should take any action which will frustrate MCI's efforts to provide Execunet service. That premise is incorrect. The Court of Appeals opinion says: "[W]e have not had to consider, and have not considered whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide * * *." 561 F. 2d at 380.

B. THE SHERMAN ACT

69. MCI, SPC and the Department of Justice have expressed the view that AT&T's refusal to provide interconnection to MCI and others may violate the antitrust laws. AT&T's petition at least implicitly requests that we determine that question inasmuch as it seeks a ruling that AT&T has no obligation to provide interconnection for Execunet and other similar services. While we must and do refuse to sanction AT&T's overly-broad language, we must also decline to rule on the antitrust issue. Although we do consider the basic policies of the antitrust laws in the context

of "public interest" determinations [10] and we do have some enforcement responsibilities under Sections 2, 3, 7 and 8 of the Clayton Act, 15 U.S.C. 13, 14, 18 and 19, we do not have authority to enforce the Sherman Act, 15 U.S.C. 1–7. *See United States* v. *Radio Corp. of America,* 358 U.S. 334, 339–46 (1959); c.f., *United States* v. *Pacific & A.R. & Wav. Co.,* 228 U.S. 87, 105 (1913). The comments do not clearly identify the statutory basis for any antitrust claim based on AT&T's refusal to interconnect, but MCI, SPC and Justice appear to be relying upon Sherman Act cases. For example, SPC relies upon a statement in *United States* v. *Otter Tail Power Co.,* 331 F. Supp. 54, 61 (D.Minn. 1971), *affirmed,* 410 U.S. 366 (1973) that "[t]he Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms." We could not make a definitive determination that AT&T's present course of conduct does or does not violate the Sherman Act.[11]

C. THE COMMUNICATIONS ACT

70. SPS claims that the first clause of Section 201(a) of the Communications Act imposes a duty to interconnect apart from a Section 201(a) order. The first clause states: "It shall be the duty of every common carrier engaged in interstate or foreign commu-

[10] In this instance we are not making such a public interest determination, that will be made in the context of another proceeding.

[11] We believe that it would also be inappropriate for us to attempt to determine the scope of AT&T's interconnection obligations, if any, under any legal standards other than those embodied in the Communications Act.

nication by wire or radio to furnish such communication service upon reasonable request therefor;" * * * The Section continues: "and in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connection with other carriers, to establish through routes and charges applicable thereto and the division of such charges, and to establish and provide facilities and regulations for operating such through routes." AT&T claims that the first clause is limited to ultimate users of communication services and that its obligations to other carriers are governed exclusively by the second clause. Neither SPC nor AT&T cites any authority to support its interpretation.

71. If the first clause of Section 201(a) automatically imposed a duty to interconnect for any service the requesting carrier may lawfully provide the second clause of that subsection would be superfluous. A construction of a statutory provision which renders one clause of the provision superfluous "offends the well-settled rule of statutory construction that all parts of the statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973). Accordingly, the first clause of Section 201(a) cannot be interpreted to require a carrier to grant every interconnection request from another carrier to provide an interstate communications service.

72. However, it does not follow that the first clause never imposes a duty to provide services to another carrier in the absence of a Commission order under the second clause of Section 201(a). If a carrier files a tariff describing services which it will provide to

other carriers it has a duty to provide such services even if the tariff filing was not compelled by a Section 201(a) order. A refusal to provide tariffed services upon request would violate the first clause of Section 201(a) and Section 203.

73. AT&T has filed a tariff describing the services and facilities which it furnishes to other carriers. That tariff provides for a variety of dedicated local loops, intra and inter-exchange lines, and other facilities and interconnections which may be required to complete a wide range of specialized and private line service offerings. However, it does not offer any facility or any interconnection with local exchange facilities or services of a type which specialized common carriers could utilize to provide Execunet or any similar service. The local operating company facilities which MCI presently utilizes to provide Execunet were apparently obtained pursuant to local exchange service tariffs which have not been filed with this Commission. Therefore, a refusal to provide additional interconnections for Execunet and similar services would not violate the first clause of Section 201(a) or Section 203.

74. Some comments opposing the AT&T petition contend that Bell operating companies which refuse to interconnect with specialized common carriers for the provision of Execunet or similar services are discriminating in favor of AT&T Long Lines. Such comments may be intended as a contention that AT&T's action violates Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), which provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or in-

> directly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class or persons, or locality to any undue or unreasonable prejudice or disadvantage.

75. The services which local operating companies have been providing to MCI for Execunet service have not been furnished on terms which could be compared to the allocation of interstate toll service revenue between AT&T Long Lines and local operating companies. It is our understanding that neither MCI nor any other specialized common carrier has ever requested that interconnection facilities be provided on some basis which could provide the local operating company with the same revenue it would receive if the specialized common carriers' customers utilized MTS or WATS service. Under these circumstances, a refusal to interconnect does not arguably subject the specialized common carriers to an "unreasonable prejudice or disadvantage" *vis-a-vis* AT&T's Long Lines Department.

76. We have not determined whether Section 202(a) could impose an interconnection obligation apart from a Section 201(a) order if a specialized common carrier did request interconnection upon terms which are substantially equivalent to WATS or MTS from the local operating company's perspective. That question appears to be purely hypothetical under the present circumstances.

V. AFFIRMATIVE ACTION

77. USITA and Continental have suggested that we should act to inhibit the expansion of Execunet and

similar services until we can complete necessary proceedings to determine whether competition in the MTS-WATS market is or is not in the public interest. Such suggestions are contained both in comments filed in this proceeding and in a separate petition which Continental filed on January 25, 1978. Some of the other comments have expressed the view that any affirmative action by this Commission which is designed to preserve the *status quo* would be undesirable and/or unlawful.

78. Such affirmative action requests are beyond the scope of this particular proceeding. Accordingly, we have not considered contentions with respect to the desirability or undesirability of preserving the *status quo* or the extent of our power, if any, to accomplish that result. Our actions herein are directed solely to the clarification of the telephone industries' obligations under the Communications Act to provide interconnection of the type apparently required to complete Execunet-type services.

CONCLUSIONS

79. The Petition for a Declaratory Ruling is granted insofar as it requests a determination with respect to the scope of the petitioners' interconnection obligations to specialized common carriers under prior orders of this Commission issued pursuant to Section 201(a) of the Communications Act. We conclude that our prior Section 201(a) orders do not direct the petitioners to provide interconnection of facilities or services to any specialized common carrier to enable such a specialized common carrier to provide any service which is substantially equivalent to MTS or WATS.

80. The Petition for Declaratory Ruling is granted insofar as it requests a determination with respect to the effect of the Court of Appeals mandate in *MCI Telecommunications Corp.* v. *FCC*, 561 F. 2d 365 (D.C. Cir. 1977), *cert. denied*, —— U.S. —— (No. 77-420), 46 U.S.L.W. 3448 (January 16, 1978), upon the scope of petitioners' interconnection obligations to specialized common carriers. We conclude that the Court of Appeals mandate in that case has no effect upon the scope of petitioners' interconnection obligations.

81. The Petition for a Declaratory Ruling is granted insofar as it requests a determination of the scope of petitioners' interconnection obligations to specialized carriers under the first clause of Section 201(a) and Section 203 of the Communication Act. We conclude that the first clause of Section 201(a) and Section 203 do not impose any obligation upon petitioners to furnish facilities or services to specialized common carriers which are not described in an effective tariff filed with this Commission.

82. The Petition for a Declaratory Ruling is granted in part insofar as it requests a determination with respect to the scope of petitioners' interconnection obligations to specialized common carriers under Section 202(a) of the Communications Act. We conclude that Section 202(a) does not impose any obligation upon local operating companies which interconnect with an interstate carrier to provide a through service to interconnect with a second interstate carrier to provide a through service if the second carrier fails to offer compensation to the local operating companies which is comparable to the compensation the local operating companies receive from the first carrier.

83. The Petition for a Declaratory Ruling is denied insofar as it requests a determination with respect to the scope of petitioner's interconnection obligations to specialized common carriers, if any, under the Sherman Act, the common law, or any federal or state statute other than the Communications Act.

ORDER

84. IT IS ORDERED, That the Petition for a Declaratory Ruling IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO,
Secretary.

SEPARATE STATEMENT OF CHAIRMAN CHARLES D. FERRIS

RE: Southern Pacific Communications Company Tariff Revisions, Inquiry into MTS and WATS Market Structure, and Petition of American Telephone and Telegraph Company for Declaratory Ruling

I join in the three related opinions the Commission adopts today with regard to telephone service competition and interconnection because I believe they are responsible approaches to difficult and vital policy questions and because I am convinced that they apply the law correctly. Although I subscribe fully to the rationale stated in the opinions, I add my separate remarks as a personal overview of where we are in telephone service competition and where I believe we are going.

I. WHERE WE ARE

For about ten years now, the Commission has been opening segments of the interstate and foreign communications market to competition. Starting with an industry that traditionally had been monopolistic, the Commission has looked to see where competition would serve the public and has taken the appropriate regulatory steps to make that competition possible. In 1969, my predecessors here authorized MCI to get into the intercity private line service business on the Chicago-St. Louis route.[1] Two years later, at the end of a broad policy-making proceeding, the Commission adopted its specialized common carrier decision, opening a substantial segment of the specialized intercity communications market to competition nationwide.[2] In 1972, the Commission extended the same policy to the domestic satellite communications industry, which appeared to be on the verge of exploiting new space technology in a manner that could revolutionize voice and data communications in this country.[3] In 1976, the Commission removed the monopoly carriers' restrictions on "resale and sharing" of private line services to open the way (1) for brokerage of communications service in competition with the established carriers and (2) for more flexible sharing arrangements in which small users will be able to pool their needs and buy large packages of

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[1] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), 21 FCC 2d 190 (1970).

[2] *Specialized Common Carrier Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[3] *Domestic Communications-Satellite Facilities*, 35 FCC 2d 844, 38 FCC 2d 665 (1972).

service to be shared according to individual needs at lower unit costs.[4]

While I cannot share in the credit for these initiatives because I came to the Commission only recently, I applaud and enthusiastically endorse them.[5] I firmly believe that the marketplace should have as big a voice as possible in deciding such questions as the rates to be charged for services, what kinds of services will be offered, and who shall serve. Moreover, I am committed to extension of our present policies favoring competition to any area of communications in which we can conscientiously and responsibly find that such competition would benefit the public.

Having said this much, I must go back and underscore the words "conscientiously" and "responsibly." Our mandate under the Communications Act is to establish policy and implement it in such a way as to ensure a rapid and efficient communications system in this country at reasonable charges to the public.[6] As I understand that mandate, it requires us to evaluate the consequences of significant regulatory actions so that we are in a position to make knowledgeable decisions. That is why the so-called "expert" agency was created.

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[4] *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T* v. *FCC*, No. 77-4057, 2d Circuit (decided January 26, 1978).

[5] I also am proud of this agency's initiatives in the area of terminal equipment competition. *See, e.g., Interstate and Foreign Message Toll Telephone Service*, 56 FCC 2d 593 (1975), 58 FCC 2d 736 (1976), *aff'd sub nom. North Carolina Util. Comm.* v. *FCC*, 552 F. 2d 1036 (4th Cir. 1977), *cert. denied*, 46 U.S. L.Wk. 3219 (October 3, 1977).

[6] 47 U.S.C. § 151.

The Commission, I believe, has been faithful to that mandate in developing the policies that have opened selected common carrier markets to competition. It has conscientiously and responsibly evaluated the possible public costs and benefits of competition in discrete services and technologies, and has made significant and orderly progress toward opening this historically monopoly market.

The matters that are before us today challenge our resolve to maintain control of the developing competition. As a result of the District of Columbia Circuit's ruling in the *Execunet* case,[7] the specialized carriers now have authority to provide classes of service (with their existing facilities) that the Commission never has evaluated for purposes of deciding whether competition will serve the public interest. This resulted, in the Court's view, from the Commission's failure in its seminal specialized common carrier proceeding to take the appropriate procedural steps and make the requisite findings that would justify restrictions on the carriers' service offerings. I do not agree with the Court's ruling, but that is beside the point. The Supreme Court declined to grant our petition for writ of certiorari, and we are thus bound to respect the mandate of the Court of Appeals.

I do not understand the Court's mandate, however, as requiring us to abdicate our continuing responsibility to evaluate the role of competition in common carrier markets before we take regulatory actions. Nor do I understand the *Execunet* opinion to have vitiated the decision of the Third Circuit in the *Bell of Penn-*

[7] *MCI Telecommunications Corp.* v. *FCC*, 561 F. 2d 365 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L Wk. 3448 (January 16, 1978).

sylvania case,[8] which construed our orders requiring AT&T to interconnect with the specialized common carriers as limited to private line services. I regard our decisions today as consistent with our obligations under the mandates of both Courts. Moreover, I view these actions as consistent with our obligations under the Communications Act and as a reassertion of our commitment to orderly consideration of the vital public interest questions surrounding the competitive offering of communications services.

First, we are rejecting the tariff of Southern Pacific Communications Co., which would offer an MTS-like service despite the absence of requisite interconnection privileges, because we have not decided as a matter of policy whether the public interest requires such interconnection. Second, we are declaring that AT&T has no present obligation under any of our outstanding orders to interconnect with the specialized carriers for purposes of providing MTS and WATS services, because, once again, we have not decided as a matter of policy whether the public interest requires such interconnection. Third, we are initiating a new rulemaking proceeding to determine, on an appropriate record, whether we should open MTS and WATS to competition, and, if so, whether to require interconnection with the telephone companies.

I have struggled with the issues raised by these three items and have considered all the possible alternatives. In the end, there simply is no way to get around the crucial facts that (1) the services involved

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[8] *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F. 2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). The Third Circuit affirmed and construed the Commission's order in *Bell System Tariff Offerings*, 46 FCC 2d 412 (1974).

in the Southern Pacific tariff and the AT&T petition for declaratory ruling are not private line but are the functional equivalent of MTS or WATS, and (2) our outstanding orders requiring AT&T to interconnect with the specialized carriers, as construed and affirmed by the Third Circuit,[9] do not provide the basis for interconnection with services that are not private line. In those circumstances, the only intellectually honest decision was to grant AT&T's request for declaratory ruling and recognize the flaw in Southern Pacific's tariff.

There were possible options for dealing with Southern Pacific. Instead of rejecting, we might arguably have suspended the tariff for five months pending an *ad hoc* hearing on its claim to interconnection rights. Or we might have allowed the tariff to become "effective" with a notation that the service could not actually be provided unless and until Southern Pacific acquired the requisite interconnection. But the practical result would have been the same: Southern Pacific could not have offered or provided the service without getting interconnection with the essential terminal facilities. Our order rejecting the tariff without prejudice to refiling seems to me to be a more straight-forward and a cleaner resolution of the matter than either of the options, both of which are legally suspect at best.[10]

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[9] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F. 2d at 1273–74.

[10] Without going into detail, I point out that hearings on tariffs normally do not go into such public interest questions as whether interconnection should be ordered. *Compare* 47 U.S.C. § 204 *with* 47 U.S.C. § 201(a). I point out also the fiction in allowing a tariff to become "effective" even though the carrier as a practical matter cannot provide the service the tariff purports to offer. *See* 47 U.S.C. §§ 201(a), 203.

These actions are not a retreat from our sound policy favoring competition where it is feasible; nor do they constitute a freeze or a lid on further expansion of competition, since they leave unimpaired the carriers' ability to develop new private line services. Rather, they recognize our need to compile the appropriate record for making decisions that may affect the quality and price of communications for many years to come. I believe this is entirely consistent with the Court's mandate in the *Execunet* case.

II. WHERE WE ARE GOING

In its concluding paragraph, in *Execunet*, the Court of Appeals stated:

> [W]e have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. In that eventuality the Commission must be ever mindful that, just as it is not free to create competition for competition's sake, it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly.

MCI Telecommunications Corp. v. *FCC*, 561 F. 2d at 380. I have absolutely no quarrel with this statement; in fact, I wish I had said it myself.

But the statement reveals a crucial truth: Neither the Court nor this agency ever has considered

"whether competition like that posed by Execunet is in the public interest." Yet, it is evident that someone must consider that question if we are to have a competition policy that rests on sound evaluation of the consequences of various alternatives.

We have begun that evaluation in the inquiry initiated today. The very fact that we are looking into MTS and WATS, in my view, means that we are meeting the toughest problems head-on. Our inquiry will address all aspects of whether sound public interest objectives would be served by a continuation of the *de facto* monoply in MTS and WATS, full competition in those services, or some middle position.

The approach we are taking in the inquiry will enable us to get away from the tedious task of deciding whether particular services fit into the definition of private line. It is my hope that we will be able to isolate those services—if any—that are to remain free from competition for now, and that the questions we will face in future *ad hoc* disputes will go to whether the proposed services are in the zone we have not yet opened to competition. This still may involve scrutiny of service characteristics and comparisons with definitions; but our inquiry should result in definitions that are specific enough to resolve all but the closest cases almost ministerially.

The inquiry will visit the crucial policy issues outlined in today's notice, including questions about separations and settlements and the possible impact of MTS and WATS competition on local rates and on national rate averaging. It will also consider ways to minimize that impact, if the record established that there will be any, so that competition may extend as far as possible consistently with the public interest. We will not entertain any presumptions in favor of

continuing any *de facto* monopoly situations;[11] nor will we create or promote competition for its own sake.[12] Our sole guide and objective must be the public interest.

In the meantime, we will entertain petitions for *ad hoc* consideration of requests for interconnection for discrete services over particular routes, such as the services and routes contemplated in Southern Pacific's tariff. I have no intention of allowing our competitive initiatives to grind to a halt while we consider pushing the frontiers still farther. I also expect—and will demand—that the inquiry and any *ad hoc* proceedings move forward expeditiously and that no interested party benefit from delay.

I fully expect these actions to be challenged in Court. For myself, I welcome judicial review in this instance, because I believe the reviewing Court will recognize and respect our need to do our job. We have no authority to abdicate our responsibilities under the Communications Act.[13] We also have no desire to do so.

This Commission's policies over the past decade of introducing competition into a monopoly market have been highly innovative and reflect a significant departure from traditional utility regulation. These policies have significantly changed the status quo in the telephone industry and resulted in new services and benefits to the public. They have also resulted both in

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[11] *MCI Telecommunications Corp.* v. *FCC*, 561 F. 2d at 380.

[12] *Id. See also FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96–97 (1953); *Hawaiian Telephone Co.* v. *FCC*, 498 F. 2d 771, 776–77 (D.C. Cir. 1974).

[13] *AT&T* v. *FCC*, No. 77–4057, Second Circuit, *slip opinion*, p. 6549. *Cf. Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380 (1974).

rethinking of old assumptions and in resistance to new ideas and change.

The courts and the Congress have given attention to these important public policy developments, as it is their role to do. I am committed, however, to assuring that this agency carry out effectively its responsibilities as the expert agency in this dynamic field within its present flexible mandate from the Congress and within the framework of judicial oversight.

DISSENTING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

The Commission today grants in part a Petition for Declaratory Ruling filed by American Telephone and Telegraph Company and rejects a proposed tariff for SPRINT Option V filed by Southern Pacific Communications Company. This action is based upon a misreading of both the letter and spirit of the U.S. Court of Appeals for the District of Columbia Circuit *Execunet* decision,[1] and, from that Court's interpretation of the *Specialized Common Carrier* decision.[2] Therefore, I dissent. I would find that AT&T must provide the necessary interconnections to allow MCI and SPC to use their existing facilities to offer those services which the *Execunet* court found MCI may offer. In addition, I would find no ground under which we can lawfully reject the SPRINT V tariff, since necessary interconnections are mandated.

Our 1971 *Specialized Common Carrier* decision declared our policy favoring "full and fair competi-

[1] *MCI Telecommunications Corp.* v. *FCC*, 561 F. 2d 365 (D.C. Cir., 1977), cert denied, 46 U.S.L.W. 3448 (1978).

[2] 29 FCC 2d 870 (1971), aff'd sub nom *Washington Utilities and Transportation Comm.* v. *FCC*, 513 F. 2d 1142 (9th Cir., 1975), cert. denied, 423 U.S. 836 (1975).

tion" among established and new "specialized" carriers for the provision of "specialized common carrier services." Both in that case and in the subsequent *Bell System Tariff Offerings*,[3] we determined that the specialized carriers were limited to the offering of specialized private line services. *See MCI Telecommunications Corp.*, 60 FCC 2d 25, 36 (1976).

When MCI sought interconnection with the Bell System Operating Companies for the provision of end-to-end foreign exchange (FX) and common control switching arrangement (CCSA) services, we found that the *Specialized Carrier* decision could reasonably be read to grant those Section 201(a) interconnections "essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communication services." 46 FCC 2d at 438.

AT&T asserted in the appeal of *Bell System Tariff Offerings* that our opinion was "somewhat vague and, to a certain extent, "overbroad." 503 F. 2d at 1273. The Third Circuit held, however, that the interconnection requirements must be read in the context of the *Specialized Common Carrier* decision itself. "Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear." *Id.* The apparent interpretation given the *Specialized Carrier* decision in the Third Circuit was that the specialized carriers were authorized therein to offer only specialized, *private line* serv-

[3] 46 FCC 2d 413 (1974), aff'd sub nom *Bell Tel. Co. of Pa.* v. *FCC*, 503 F. 2d 1250 (3d Cir., (1974)), cert denied, 422 U.S. 1026 (1975).

ices, and that interconnection must be granted for the offering of these authorized services, and only for these services. If the law had remained static since that time, I would agree with AT&T that it is under no obligation to interconnect for the provision of Execunet-type services.

The law has not remained static, however, but rather the D.C. Circuit has added a new dimension—a new interpretation of the *Specialized Common Carrier* decision. In *Execunet,* the Court ruled that the specialized carriers are *not* limited in the services which they may offer, except as to the technical limitations of their authorized facilities. Rather, "MCI's facility authorizations are not restricted and therefore its tariff applications could not properly be rejected." 561 F. 2d at 379. Although I disagree with the Court's reading of our *Specialized Carrier* decision, as I believe that the Commission lawfully limited the specialized carriers to the offering of private line services, the Court of Appeals has spoken and the Supreme Court has declined review. We are bound, therefore, by the law of the case, and we are now required to interpret the *Specialized Carrier* decision in the light of the D.C. Circuit's *Execunet* holding.

Execunet determined that we cannot impose any restriction on the services which the specialized carriers are authorized to offer unless we "affirmatively determine . . . that 'the public convenience and necessity [so] require.'" 561 F. 2d at 377. We made no such determination in *Specialized Common Carriers,* and therefore could not lawfully reject the Execunet tariff. Clearly, the D.C. Circuit's findings would be a nullity were we to deny interconnection necessary for provision of such services. *Bell System Tariff Offerings* held that *Specialized Common Carriers* mandated

interconnections necessary for services authorized therein, and the *Execunet* court found those services unrestricted. Since Execunet-type services are presently authorized, these cases read together mandate interconnection.

SPRINT Option V, a service virtually identical to Execunet, must also be found to be authorized. Following the analysis with regard to Execunet, necessary interconnections must also be provided for the offering of end-to-end SPRINT V service, and the Commission's justification for rejection fails.

We have before us a separate petition filed by Continental Telephone Company and supported by the U.S. Independent Telephone Association requesting us to prohibit any expansion of Execunet pending completion of a proceeding on MTS/WATS market structure. Without reaching the question of whether we can lawfully grant the relief Continental requests, I believe that no such order is required. If MCI, SPC and other specialized carriers offered Execunet-type services over all *existing* facilities, no significant harm can reasonably be anticipated. There is simply insufficient capacity to constitute an economic threat to established telephone companies and their subscribers. Until the market structure proceeding is completed, however, we should not grant the specialized common carriers any additional facilities unless they agree not to expand their Execunet-type offerings. This will avoid any possibility of adverse economic impact pending a firm MTS/WATS market structure determination.

In view of this lack of potential adverse economic impact, it is clear to me that we have not lost control over the interstate telecommunications industry, as

has been alleged. By restricting the provision of Execunet-type services to presently authorized facilities, we are holding a tight rein over the extent of these services, both in terms of cities served and customers that can be accommodated within existing service areas. Therefore, pending a determination as to any appropriate revisions to the industry structure, and pending a determination as to any necessary revisions to the separations process, we remain in full control of the market, and no prohibition against expansion of Execunet-type services over existing authorized facilities is required.

Therefore, from both a legal and a policy viewpoint, I believe that AT&T's petition should be denied, SPRINT V should be permitted to become effective, and we should impose a moratorium on additional facility authorizations pending a final market structure determination.

APPENDIX D

United States Court of Appeals for the District of Columbia

SEPTEMBER TERM, 1977

No. 75-1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. AND N-TRIPLE-C INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL., INTERVENORS

Filed May 8, 1978

Before: WRIGHT, *Chief Judge*; TAMM and WILKEY, *Circuit Judges.*

ORDER

Upon consideration of the petitions for rehearing filed by respondent Federal Communications Commission and intervenors American Telephone and Telegraph Co. and United States Independent Telephone Association, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam.

For the Court:

GEORGE A. FISHER,
Clerk.

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1977

No. 75–1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. AND N-TRIPLE-C INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL., INTERVENORS

Filed May 8, 1978

Before: WRIGHT, *Chief Judge;* BAZELON, TAMM, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

ORDER

The suggestions for rehearing *en banc* filed by respondent Federal Communications Commission and intervenors American Telephone and Telegraph Co. and United States Independent Telephone Associa-

tion, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam.

For the Court:

GEORGE A. FISHER,
Clerk.

APPENDIX E

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1977

No. 75–1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL., INTERVENORS

Filed May 11, 1978

Before: WRIGHT, *Chief Judge,* and TAMM and WILKEY, *Circuit Judges.*

ORDER

Intervenor United States Independent Telephone Association has filed a motion for a further stay of this court's order of April 14, 1978. For the reasons stated in the attached *per curiam,* it is ORDERED that that motion is hereby denied.

Intervenor American Telephone and Telegraph Company has filed a motion for a temporary stay of this court's order of April 14, 1978 until May 12, 1978,

to permit application to the Chief Justice of the United States. It is ORDERED that the motion of intervenor American Telephone and Telegraph Company is hereby granted.

It is FURTHER ORDERED that if the application is made at or before noon on May 12, 1978 the stay is extended until the Chief Justice acts.

Per Curiam.

For the Court

GEORGE A. FISHER,
Clerk.

PER CURIAM: The United States Independent Telephone Association (USITA), an intervenor in this action, has filed with this court a petition for a stay of the panel's unanimous decision of April 14, 1978 granting MCI Telecommunications Corporation's motion for an order directing compliance with our mandate in *MCI Telecommunications Corp.* v. *FCC,* 561 F. 2d 365 (D.C. Cir. 1977), *cert. denied,* —— U.S. ——, 46 U.S. L. Week 3446 (Jan. 16, 1978) (*Execunet I*). *See MCI Telecommunications Corp.* v. *FCC,* —— F. 2d —— (D.C. Cir. No. 76–1635, decided April 14, 1978) (*Execunet II*). In seeking a stay USITA raises again the very same arguments unanimously rejected by this panel in *Execunet I,* which the Supreme Court declined to review, in *Execunet II,* and in the petitions for rehearing. These same arguments were raised as well in the suggestions for rehearing *en banc* filed by the Commission, AT&T, and USITA, which led not one judge on this court to request a vote on *en banc* consideration. *See* Rule 35(b), FED. R. APP. P. It is our view that this case has been amply litigated, and that the time has come for enforcement of our original

mandate in *Execunet I*. USITA has not "made a substantial case on the merits," *Washington Metropolitan Area Transit Com'n* v. *Holiday Tours, Inc.*, 599 F. 2d 841 (D.C. Cir. 1977), nor has it demonstrated that there will be irreparable injury without a stay, or that a stay is necessary to serve the public interest and will not substantially harm the opposing parties in this proceeding,[1] *id.*; *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958). We therefore deny the petition for a further stay. In order to allow AT&T to seek a stay from the Circuit Justice, however, we hereby grant its motion for a temporary stay. But lest there be any confusion as to our views, we hereby set forth briefly, hopefully for the last time, the issues at stake in this case and the reasons why we believe the arguments raised once again here to be wholly without merit.

I

The background of these proceedings is detailed at length in both the original opinion, *Execunet I, supra*, 561 F. 2d at 367–373, and our recent opinion granting MCI's motion, *Execunet II, supra*, slip op. at 4–9.

[1] Indeed, the Department of Justice, in opposing the FCC's grant of AT&T's petition for a declaratory ruling which led to our Execunet II decision, emphasized that "AT&T totally failed to make any factual showing of harm in its petition to invoke Commission protection against competition in the intercity services market." *See* Comments of the United States Department of Justice, *In the Matter of Petition of American Telephone and Telegraph Company for Declaratory Ruling and Expedited Relief*, submitted as Appendix A to MCI Reply to Oppositions, *MCI Telecommunications Corp.* v. *FCC* (March 9, 1978), at 7. AT&T and the FCC have yet to make such a showing, or to demonstrate in any way that the public interest would be adversely affected by expansion of Execunet service.

What is involved is MCI's provision of Execunet service, whereby a subscriber making use of local AT&T-furnished interconnections at both ends of an MCI-furnished interstate line can reach any telephone in a distant city served by the MCI line. In the proceedings under review in *Execunet I* the Commission rejected MCI's tariff for Execunet service on the ground that its earlier decisions establishing the scope of MCI's facilities authorizations—notably the *Specialized Carrier* decision, *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Com'n* v. *FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975)—did not encompass Execunet-type services. This court reversed unanimously, holding that MCI did have authority to provide Execunet service. We found that an affirmative determination to exclude certain services is necessary to restrict a carrier's facilities authorization, and that no such determination had been made in *Specialized Carrier*. In reaching this determination this court broadly construed the scope of the *Specialized Carrier* decision and emphasized that that decision contemplated rulemaking and tariff review according to public interest standards as the exclusive mechanisms for imposing future controls on the development of specialized carriers such as MCI.

Certiorari was denied in *Execunet I* on January 16, 1978. On the same day AT&T filed with the Commission a petition for a declaratory ruling that it was under no obligation to furnish the local connections necessary for MCI's provision of Execunet service. The Commission responded by issuing a declaratory ruling to that effect on February 23, leading MCI to request that this court grant a motion directing the FCC and AT&T to comply with the *Execunet I* man-

date. Since the Commission's declaratory ruling undermined our *Execunet I* mandate, on April 14, 1978 we granted the motion directing compliance.

Our grant of MCI's motion for compliance was based on the clear and intentional inconsistency of the Commission's February 23 declaratory ruling with our opinion and decision in *Execunet I*. In its declaratory ruling the Commission framed the critical question as "a determination as to what services were explicitly *excluded* from consideration" in its earlier decisions, and concluded that Execunet service was so excluded. FCC Declaratory Ruling ¶ 59 (emphasis in original). That is precisely the question, however, which was presented and determined—in directly contradictory fashion—by this court in *Execunet I*. In relying on the opposite conclusion to support its declaratory ruling the Commission, we found, had acted "in direct and explicit contradiction" to our *Execunet I* mandate. *Execunet II, supra,* slip op. at 14. In addition, we found the Commission's interpretation of *Specialized Carrier* and its reliance on interconnection obligations effectively to limit the service offerings of MCI to be directly at odds with the basic themes of our *Execunet I* decision: "that *Specialized Carrier* represented a broad decision by the Commission to allow carriers such as MCI to enter the market and compete with AT&T, subject only to later limitations based on public interest determinations in tariff or rulemaking proceedings." *Id.* Finally, we addressed and rejected the argument that the Commission's position in its declaratory ruling was mandated by the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania* v. *FCC,* 503 F. 2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975), finding our decision to be wholly consistent with—and indeed deriv-

ing support from—that reached by the Third Circuit in *Bell Telephone.*

Subsequently, we granted a stay of our order pending disposition of the petitions for rehearing and suggestions for rehearing *en banc* to afford the Commission and AT&T the fullest opportunity to press their claim. Extensive petitions for rehearing and suggestions for rehearing *en banc* were then filed by the FCC and AT&T, as well as by USITA. We unanimously denied the petitions for rehearing on May 8, 1978. Rehearing *en banc* was denied on the same day, with no judge on this court having requested a vote on the suggestions. *See* Rule 35(b), FED. R. APP. P.

II

In seeking a stay of our order, USITA continues to stress the two points which have been emphasized throughout these proceedings: that the interconnection obligation of AT&T was neither mentioned nor addressed in *Execunet I*, and that *Execunet II* is inconsistent with the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania* v. *FCC, supra.*

As to the first point, the fact is that until the Supreme Court denied certiorari in *Execunet I* AT&T provided the interconnections necessary for Execunet service without any form of protest or objection. The obligation of AT&T as a common carrier to provide the necesary interconnections was conceded all through the *Execunet I* proceedings, and they were indeed so provided. In securing the modification of our original stay of the Commission's ruling in *Execunet I,* in its briefs and arguments to this court, and in its petition for certiorari, AT&T repeatedly and consistently stressed that a decision in

favor of MCI *would* lead to further expansion and vigorous and adverse competition—a result which could occur only if AT&T was required to provide the necessary interconnections. It was only after the Supreme Court's denial of certiorari—and only a few hours afterwards, at that—that AT&T claimed for the first time that it was not required to provide interconnection for Execunet service. It was thus that we concluded in *Execunet II* that our decision in *Execunet I,* consistent with AT&T's representations during those proceedings, clearly contemplated that AT&T was and is required to provide interconnection for Execunet service. Slip op. at 10. Nonetheless, our grant of MCI's motion was not based on any abstract contemplation of the court, let alone on the private intentions of the members of the panel. *See* AT&T Petition for Rehearing at 11. Rather, it was grounded on the very clear and concrete contradictions between the court's reasoning, interpretations, and conclusions in *Execunet I* and those of the Commission in its declaratory ruling. The fact that interconnection obligations were not specifically addressed in *Execunet I* because they were assumed by the parties hardly eliminates these contradictions; if anything, it provides further support for the grant of MCI's motion to direct compliance with this court's mandate.

The argument for a further stay of our mandate based on the alleged inconsistency with *Bell Telephone* is, we think, no more persuasive. Indeed, in *Bell Telephone* the court held that AT&T was required to provide interconnection for services similar to though somewhat more limited than Execunet. The court reached this conclusion by broadly construing

the Commission's *Specialized Carrier* decision to include the services in question, notwithstanding the absence of any explicit mention of them in the Commission decision—just as we have construed *Specialized Carrier* to encompass Execunet service notwithstanding the similar absence of specific references. Certainly, no one could argue that a decision by one court that AT&T is required to provide interconnection for one service forecloses a subsequent decision that AT&T is also required to provide interconnection for a similar service which makes use of identical forms of interconnection.

There is, then, absolutely no inconsistency between the holdings of *Bell Telephone* and *Execunet I* and *II*. The only inconsistency even asserted derives instead from the Third Circuit's reasoning in rejecting AT&T's argument that the interconnection order under review in *Bell Telephone*, which required AT&T to provide interconnections "essential to the rendition of all of [the specialized carriers'] presently or hereafter authorized interstate and foreign communications services," imposed an "*unbounded*" and illegal interconnection obligation. *Bell Telephone, supra* 503 F. 2d at 1283, 1273. In response the court noted that while the order on its face gave little guidance as to the types of services that AT&T will be required to provide "hereafter," when read in context "the FCC has required AT&T to provide to the specialized carriers those interconnection elements of private line services which AT&T supplies its affiliates and furnishes to customers through its Long Lines Department." *Id.* at 1273–1274. Relying on this statement, AT&T argues that its interconnection obligations are limited by the Third Circuit decision to "private line" services and that Execunet is not such a service.

But as the FCC has recognized in its declaratory ruling, the Third Circuit's use of the term "private line" cannot be interpreted to limit the interconnection obligations arising from *Specialized Carrier* to "private line services" as that term is currently defined. Rather, the Commission has explained the court's use of the term as a shorthand or abbreviated expression encompassing a broader range of services than that which the Commission currently defines as private lines services. *See* FCC Declaratory Ruling, *supra,* at ¶ 59; *Execunet II, supra,* slip op. at 21. The relevant question, then, according to the Commission itself, is what services were explicitly excluded from consideration in *Specialized Carrier* and the decisions which followed it. The *Bell Telephone* case answered this question with respect to the services at issue in that case, but it did not address it, let alone answer it, with respect to Execunet services. That was the issue we addressed and decided in *Execunet* I. And it is the Commission's rejection of the answer we provided in *Execunet I* which necessitated our grant of MCI's motion to direct compliance.

III

Only one point remains to be addressed. USITA emphasizes, as did the Commission and AT&T in their suggestions for rehearing *en banc,* that it is the responsibility of the Commission to determine whether competition by services such as Execunet is in the public interest. With that point we are in complete agreement. Recognition of the Commission's public interest responsibilities, however, provides no basis for upholding its February 23 declaratory ruling in view of the clear inconsistencies with the *Execunet* case.

For the Commission's declaratory ruling was *not* based on considerations of the public interest, and it in no way reflected a Commission decision that expansion of Execunet service would adversely affect the public interest. Rather, it reflected only the Commission's interpretation of the statutory provisions of the Communications Act and of earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*. Indeed, it was the Commission's prohibition of Execunet service without any consideration of the public interest in the first instance which led to this long series of litigation.

The Commission has now commenced inquiry into the broad questions of competition and the public interest posed by the development of services such as Execunet. That inquiry is one which we welcome. How long it take is another question. But its existence does not justify allowing AT&T to maintain in its *de facto* monopoly pending any final rules where this court has held, in a full proceeding between these parties, that consideration of the provisions of the Communications Act and of the relevant agency and judicial precedents establishes MCI's right to enter the market now.[2]

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[2] Indeed, FCC Commissioner Joseph R. Fogarty, who dissented from both the Commission's declaratory ruling in favor of AT&T and its decision to seek a stay and rehearing by this court, stated: "I believe it is improper and counterproductive to continue this litigation any further, following two reversals by the Court of Appeals and denial of Review by the Supreme Court. Enough is enough. I would devote all available resources of this Commission to expedite determination of a reasonable competitive market structure for domestic telecommunications services." Statement of Commissioner Joseph R. Fogarty. In re Motion for a Stay of the United States Court of Appeals Order Directing Compliance with Execunet *Mandate*, submitted as Attachment A to MCI Oppositions to Stay, at 1.

The decisions reached by this court have been informed by full briefing and argument in *Execunet I* and by voluminous submissions by the parties in *Execunet II*. The parties have been afforded ample opportunities to present their positions to this court, and to the Supreme Court in their petitions for review of *Execunet I*. Our decision in *Execunet II* simply enforces the mandate of *Execunet I*, which the Supreme Court chose not to review.

U.S. GOVERNMENT PRINTING OFFICE: 1978

No. 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

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PETITIONER'S REPLY

The Federal Communications Commission, in response to oppositions filed by MCI Telecommunications Corp. and Southern Pacific Communications Co., respectfully submits this reply in support of its petition for a writ of certiorari.[1] The Commission's petition rests on (1) a direct and irreconcilable conflict between the decision below (Pet. App. 1A-24A) and an earlier decision of the Third Circuit construing the

[1] Companion petitions were filed by the United States Independent Telephone Ass'n (No. 78-216) and the American Telephone & Telegraph Co. (No. 78-217).

same FCC interconnection orders (Pet. 22-26);[2] (2) the court of appeals' improper expansion of its previous mandate[3] to govern matters that court had not considered or decided in the earlier case (Pet. 27-29); (3) judicial intrusion into the administrative process, by making and implementing substantive communications policy (Pet. 29-32); and (4) error in statutory interpretation and construction of fundamental communications policy decisions of the FCC (Pet. 32-36).[4]

The oppositions have not refuted our arguments in support of certiorari. In this brief reply, we address several basic failings in the oppositions which reflect similar failings in the decision of the court of appeals.

1. Intrusion into Administrative Process.

The court of appeals plainly has performed an administrative function by directly requiring interconnection to implement "the intended effect" of its own earlier policy decision in *Execunet I*.[5] The oppo-

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[2] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). The Third Circuit's opinion is reproduced in the Appendix to AT&T's petition in No. 78-217, pp. 1g-63g.

[3] *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Pet. App. 1B-33B).

[4] The opinion of the court of appeals now has been reported at 580 F.2d 590.

[5] See Pet. App. 18A, where the court of appeals stated that the FCC's declaratory order on interconnection "deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree."

sitions of MCI and Southern Pacific, although denying in abstract terms that this is the case,[6] do not contend that the court of appeals merely remanded the matter to the FCC for correction of legal error. Indeed, they could not make such an argument, as an examination of the proceedings below shows.

MCI phrased its request for relief in *Execunet II* as follows:

> It is requested that the Federal Communications Commission be ordered to direct the American Telephone and Telegraph Company (AT&T) and its local operating companies (Bell Companies) to continue to provide the local interconnections required by MCI to provide, over its existing facilities, Execunet service and all of its other authorized services. It is further requested that the Court rule * * * that AT&T and the Bell companies must provide such interconnections.

MCI's Motion for an Order Directing Compliance with Mandate, pp. 1-2.[7] The court of appeals granted the motion without any indication that it was ordering anything less than or different from the relief MCI had requested. App. 1A-2A, 4A-5A, 24A. Nor did anything in the order or the attached opinion purport to remand the matter to the FCC for correction of legal error. Instead, the court of appeals directly performed the administrative act of requir-

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[6] MCI Opposition 25-27; Southern Pacific Opposition 15, 19-20.

[7] See also, *id.*, p. 8; MCI's Reply to Oppositions (to its motion for an order directing compliance with mandate), pp. 50-51.

ing interconnection[8] to effectuate MCI's judicially created "right to enter the [long distance telephone service] market now." Pet. App. 10E. This Court should grant certiorari to restore the appellate process to its proper and lawful bounds. See Pet. 29-32.

2. Expansion of Mandate

The oppositions argue, in effect, that the court of appeals did not improperly expand its mandate in *Execunet II*, because its interconnection order was essential to implement the "intended effect" of the earlier decree.[9] The fundamental flaw in this reasoning is that the court of appeals simply may not have an "intended effect" other than the correction of error it has perceived and identified in review proceedings. As we pointed out in our petition—and, indeed, as the court of appeals itself was at pains to state in *Execunet I*, and as MCI and Southern Pacific assured this Court in their oppositions to certiorari in that earlier stage of proceedings—the Commission was reversed in *Execunet I* on the sole ground that the agency had not "properly exercised" its authority under Section 214(c) to restrict MCI's use of its own facilities to private line services. Pet. App. 22B-

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[8] Section 201(a) gives the FCC the authority to require carrier interconnection after opportunity for hearing and on the basis of an affirmative public interest finding. 47 U.S.C. § 201(a). The FCC believes that it has had no hearing and made no finding that would justify an order of interconnection for ordinary long distance telephone service. Pet. App. 36C-44C.

[9] MCI Opposition 15-18; Southern Pacific Opposition 12-16.

31B. The mandate arising from such a decision—as any other judicial mandate—can govern only those matters the court considered and decided directly. See Pet. 27-29, and cases cited.

The oppositions also parrot a distortion of the earlier *Execunet I* holding by which the court of appeals tried to justify its interconnection order as a mere enforcement of mandate. The Commission had taken the position in its declaratory ruling that interconnection for MTS, WATS and similar services (such as Execunet) was not encompassed in its prior Section 201(a) orders because those services had been "excluded from both the considerations and holdings" of the proceedings that led to the orders. Pet. App. 39C-40C. The court of appeals rejected that reasoning, stating:

> [The Commission] formulates the final and dispositive question for resolution as that of "what services were explicitly *excluded* from consideration in *Specialized Common Carrier*, *Bell System Tariff Offerings*, and *Bell Tel. Co. of Pennsylvania*." * * * And that is precisely the question we addressed and answered in *Execunet*, finding that Execunet services were *not* explicitly excluded.

Pet. App. 23A-24A, 5E. See MCI Opposition 16-17; Southern Pacific Opposition 14.

But the court of appeals in *Execunet I* answered no such question. In fact, it assumed, for the sake of argument, that the FCC had *not* considered services like Execunet in its policy-making proceedings. Pet.

App. 27B, 30B, 32B. On that assumption, the court stated:

> Nonetheless, it is readily apparent that *failure to consider* the public interest ramifications of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative determination that the "public convenience and necessity may require" a restriction on a facility authorization limiting a carrier to provision solely of these services proposed in its Section 214(a) application.

Pet. App. 27B-28B (emphasis added). Thus, the court of appeals found in *Execunet I* that exclusion of certain services from consideration was not a sufficient basis for inferring that those services were forbidden.[10] The court plainly did *not* find "that Execunet services were *not* explicitly excluded." Pet. App. 24A. The court's gross distortion now of its own earlier opinion is justification alone for this Court to grant certiorari and properly construe the *Execunet I* mandate on the basis of matters actually considered and decided.

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[10] The FCC's analysis of the Section 201(a) interconnection question is entirely consistent with the court of appeals' reasoning in *Execunet I*. Because Section 201(a) requires an affirmative determination that MTS/WATS interconnection is "necessary or desirable in the public interest," a failure to consider those services (*i.e.*, exclusion of those services from the scope of the inquiry in the *Specialized Common Carrier Services* proceeding) is not sufficient to create the interconnection obligation in question. Pet. App. 28C-43C, 55C-57C; Pet. 14-19.

3. Error in Statutory Construction.

MCI and Southern Pacific evade any direct response to our assertion that the FCC has never provided the requisite opportunity for hearing or made the requisite public interest finding to support an unbounded interconnection order. Instead, the argument appears to be merely that the "expansive interpretation" the court of appeals gave to MCI's facilities authorizations under Section 214 "mandates an equally expansive view of the scope of the interconnection obligations of AT&T * * *." MCI Opposition 23-24; Southern Pacific Opposition 10, 14, 18; Pet. App. 17A.

But interconnection rights and obligations under Section 201(a) are not mere corollaries to facilities authorization under Section 214.[11] Pet. 15-16, 32-36.

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[11] The history of MCI's entry into the communications business bears witness to the distinction between the right to erect and operate one's own facilities and the right to interconnect those facilities with other carriers. In *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), 21 FCC 2d 190 (1970), the FCC granted MCI its first authorizations to erect facilities to offer private line services; but it expressly reserved jurisdiction to resolve the separate question of interconnection. 18 FCC 2d at 965. On reconsideration, the FCC rejected claims that its Section 214 grants had prejudged the Section 201(a) question, pointing out that it had not ordered interconnection but had "retained jurisdiction" to resolve that matter if MCI should present a "particular application." 21 FCC 2d at 193. See also *Specialized Common Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), where the FCC posed and resolved separate issues as to facilities authorization, on the one hand, and interconnection on the other, in-

Congress provided a separate statutory provision to govern interconnection, expressly requiring an "opportunity for hearing" and affirmative public interest findings before the agency may order unwilling carriers to make their facilities available to other carriers.[12] The court's interconnection order disregards the crucial hearing and public interest findings that Section 201(a) requires, and thus misconstrues and misapplies the relevant statute.

Southern Pacific "responds" to one argument that the petitioners did *not* make: that the statute requires an "evidentiary" hearing. Southern Pacific Opposition 18. See also MCI Opposition 23. The FCC acknowledges—indeed, it argued the point successfully in the Third Circuit[13]—that its notice and comment rulemaking in *Specialized Common Carrier*

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voking *both* Section 214 *and* Section 201(a) as statutory authority for its actions. 29 FCC 2d at 878. See also 24 FCC 2d 318, 327, 349 (1970) (Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order).

[12] The court's assertion that the FCC did not rest its declaratory ruling on *current* public interest findings is wholly beside the point. Pet. App. 9E-10E; Southern Pacific Opposition 15. The FCC was disposing of a request for clarification of *existing* interconnection obligations under *prior* orders. Surely the proper inquiry for the agency was *not* "what clarification of those prior orders would best serve the public interest," but rather "what do those orders mean." The FCC may consider further interconnection in further proceedings which give proper notice and afford an opportunity for meaningful participation. But the FCC may not revise history and distort its own past orders on the basis of current notions of the public interest.

[13] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F.2d at 1259-68.

Services [14] satisfied the hearing requirement of Section 201(a) insofar as that proceeding ordered private line services interconnection. Our hearing argument in this case is that *Specialized Common Carrier Services* could not justify an interconnection order embracing services that were not considered. It is no answer to that argument to assert merely that the denial of interconnection "frustrates the purpose" of MCI's litigation and the "intended effect" of the court's decree. Pet. App. 18A. Neither the court of appeals nor the parties opposing our petition can claim that the FCC gave notice of or an opportunity to comment on interconnection for MTS, WATS and similar services. Our contention thus remains unrefuted.

4. Conflict with the Third Circuit.

MCI and Southern Pacific, like the court of appeals, lose sight entirely of the issues the Third Circuit decided, in their efforts to reconcile *Bell of Pennsylvania* [15] with *Execunet II*. Pet. App. 18A-24A, 6E-9E; MCI Opposition 18-21; Southern Pacific Opposition 16-19. The Third Circuit necessarily considered and ruled on the scope of AT&T's interconnection obligation under the same orders the D.C. Circuit considered in *Execunet II*. Pet. 22-26. The Third Circuit expressly found and held that the FCC had limited the obligation to private line services, 503

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[14] *Supra*, 29 FCC 2d 870, 31 FCC 2d 1106.

[15] *Supra*, 503 F.2d 1250.

F.2d at 1262, 1270-74; the D.C. Circuit, finding that the interconnection obligation was "equally expansive" with MCI's unlimited service authorizations, held in effect that there was no limitation at all on AT&T's obligation and MCI's rights, Pet. App. 13A-18A, 23A-24A, 9E-11E. The conflict could hardly be more direct and irreconcilable.[16]

The conflict also pervades the reasoning behind the disparate opinions. The D.C. Circuit disregarded the fact that the Third Circuit analyzed the interconnection orders in depth to determine (1) whether the FCC had satisfied Section 201(a); (2) what the FCC had considered in its inquiry; (3) the adequacy of notice and of hearing opportunities; and (4) whether the orders were fatally vague or overbroad. In each aspect of its analysis, the Third Circuit came back to and relied upon the central fact that the FCC was ordering interconnection only for private line services. 503 F.2d at 1259-74. This was crucial to its

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[16] AT&T's argument that the Third Circuit has exclusive jurisdiction to construe the FCC's interconnection order has practical as well as legal force. See AT&T Pet. 17-22; Pet. 33 n.38. If the D.C. Circuit had deferred to that court as the proper forum to review the FCC's declaratory ruling, there would be no question of conflict between the circuits and no cause to invoke this Court's jurisdiction on that ground. While conflicts may not always be avoided, this one plainly was not necessary. The D.C. Circuit was well aware of the Third Circuit's prior decision and of the petitioners' position that the Third Circuit's decision was controlling. The D.C. Circuit's insistence on granting MCI's motion demonstrates the court's preoccupation with its own policy determination in *Execunet I* and its zeal to implement that policy. *Cf. Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

resolution of arguments about the adequacy of notice and hearing, claims that the order was vague and overbroad,[17] and allegations that the FCC was unlawfully expanding its own policy to encompass services that its rulemaking proceeding had not contemplated. *Id.* See Pet. 22-26.

The D.C. Circuit, in contrast, virtually ignored the requirements of Section 201(a) and the problems of overbreadth, notice and hearing that had been the focus in the Third Circuit. Instead, it considered the motion in terms of consistency with the "basic themes" of *Execunet I*,[18] its own (unexpressed) contemplation in the earlier case that interconnection was required,[19] its notion of what would be "strikingly

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[17] The parties supporting the FCC's orders in the Third Circuit—including MCI, Southern Pacific and the Department of Justice through its Antitrust Division—assured the court that the orders extended only to private line services. Pet. App. 32C-33C, 37C. The court's reliance on those assurances is evident in its opinion. See Pet. n.28 at 24-25. MCI made similar representations to this Court—as did the FCC and the Department of Justice—in opposing a petition for certiorari to the Third Circuit. *AT&T* v. *FCC*, No. 74-1229, 422 U.S. 1026. MCI's condemnation now of "dissimulation" and "holding back of arguments," MCI Opposition 14, invites critical comparison of its own positions now with those it took before the FCC and the courts in earlier stages of specialized common carrier development. Pet. App. 32C-33C, 37C; Pet. n.20 at 16-17. See also MCI's oppositions to certiorari in *AT&T* v. *FCC*, No. 74-1229, *supra*, and *National Ass'n of Reg. Util. Commissioners* v. *FCC*, No. 74-1550, 423 U.S. 836.

[18] Pet. App. 17A.

[19] Pet. App. 12A, 17A.

unfair" to MCI,[20] and concern for the "intended effect of [its] decree." [21]

The D.C. Circuit thus posed a simple syllogism to resolve the interconnection question:

1. The FCC in *Specialized Common Carrier Services, supra,* and *Bell System Tariff Offerings* [22] ordered AT&T to interconnect with the specialized carriers for all their authorized services;

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[20] Pet. App. 12A.

[21] Pet. App. 18A. The D.C. Circuit also discussed "representations and actions" by AT&T in the earlier case which the court regarded as concession of the interconnection issue. Pet. App. 12A-13A. Although the court did not rest its decision in *Execunet II* on estoppel, Pet. App. 13A, the oppositions make much of this point, MCI Opposition 15-16; Southern Pacific Opposition 12-13. But there can be no estoppel here. See Pet. n.32 at 27-28. When the court of appeals reversed the Commission in *Execunet I* on grounds that MCI's certificates were not limited, the Commission was entirely free on remand to take into account issues and factors that the court had not foreclosed in its decision. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 200-01 (1947); *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). There can be no legitimate claim that the FCC has resorted to "piecemeal" litigation, holding the interconnection point in reserve. There simply was no reason for the FCC to consider alternative grounds for rejecting MCI's Execunet offering, because there had been no suggestion before *Execunet I* that MCI had authority beyond private line services. As a procedural matter, of course, FCC counsel could not have raised the interconnection question in the courts because it had not been the basis for the agency's decision. See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

[22] 46 FCC 2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Penn.* v. *FCC, supra,* 503 F.2d 1250.

2. *Execunet I* established that MCI, a specialized carrier, was authorized to offer Execunet (as well as any other service its facilities were capable of providing); and

3. Therefore, AT&T has been ordered to interconnect with MCI for purposes of offering Execunet (as well as any other service MCI's facilities are capable of providing). Pet. App. 13A-18A.

The court's attempt to reconcile its decision with the Third Circuit's [23] is not responsive to our claim of conflict.[24] The Third Circuit *had* to determine the reach of the interconnection requirement. It found that FX and CCSA were within that reach *because* they were private line services. Moreover, that court found that the interconnection orders were not overbroad *because* they were limited, when read in context, to private line services. The entire theory of that case, as well as its express holdings on issues that AT&T raised directly, requires the conclusion that the Third Circuit held the interconnection orders to be limited to private line services.

The D.C. Circuit and the oppositions would have this Court disregard the essential analysis and holdings of *Bell Telephone Co. of Penn.* and to entertain the fiction that no conflict exists. But the D.C. Cir-

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[23] "[J]ust as the Third Circuit found *Specialized Carrier* sufficiently broad to include FX and CCSA service, notwithstanding the absence of specific references to those services, so too we have found that decision broad enough to encompass Execunet, notwithstanding the similar absence of specific references." Pet. App. 21A; 7E-8E.

[24] Pet. 22-26.

cuit could not amend or erase the Third Circuit's decision by means of a subsequent decision resolving a "very different issue." Pet. App. 27B n.59. This Court should grant the petition to resolve the conflicting mandates, so that the Commission will know which to obey.

5. Ripeness and Timeliness.

The oppositions appear to argue that the petitions come both too early and too late.[25] They are too early, it is claimed, because the court of appeals really has not done anything yet; and they are too late because this Court denied certiorari in *Execunet I*.

Review now surely would not be premature. The D.C. Circuit already has adopted and implemented communications policy in derogation of the FCC's responsibility. It has improperly ordered interconnection in violation of the applicable statute. It has expanded its prior mandate to cover matters it had not considered and decided before. It has ruled in direct and irreconcilable conflict with the Third Circuit. There is no reason for this Court to wait further.[26]

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[25] *Compare* MCI Opposition 14, 18 and Southern Pacific Opposition 14-15, *with* MCI Opposition 25-27 and Southern Pacific Opposition 19-21.

[26] The Commission's ongoing inquiry into MTS/WATS competition, *MTS and WATS Market Structure* (CC Docket No. 78-72), 67 FCC 2d 757 (1978), cannot correct the serious judicial errors the D.C. Circuit has committed. While that proceeding will consider interconnection questions in the context of broad agency policy, it cannot restore the proper roles of agency and court that *Execunet II* has grossly distorted.

The argument of prematurity, moreover, sounds now like a cry of "wolf" in the light of similar arguments opposing certiorari in *Execunet I*. See Pet. 13. MCI and Southern Pacific may not evade review in this Court by denying breadth in the orders below, while the court of appeals purports to enforce those orders according to their most "expansive interpretation." [27]

As for lateness, we have made clear that our petition seeks review of *Execunet II*. *E.g.*, Pet. 8 n.3. Our petition assumes that *Execunet I* is now binding on the Commission. *Id.* We do not dismiss the possibility that the Court, upon granting our petition, will look to the underlying decision as well.[28] But our petition looks to *Execunet II* only and plainly is timely filed. Pet. 2.

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[27] *Compare* Pet. App. 32B-33B *with id.* 17A-18A and 10E.

[28] By adopting the device of an order enforcing the *Execunet I* mandate and interpreting that mandate expansively to govern matters not previously considered and decided, the D.C. Circuit itself may have opened the earlier decision to review. *Cf. Federal Trade Comm'n* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965), and cases cited at 379.

CONCLUSION

The Court should grant the petition.

Respectfuly submitted,

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